90-1766

Supreme Court, U.S.
FILED
MAY 15 1991
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL EXPRESS CORPORATION,
Petitioner,

vs.

TENNESSEE PUBLIC SERVICE COMMISSION, KEITH BISSELL, FRANK COCHRAN, and STEVEN HEWLETT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARIAN F. HARRISON
JEFFREY G. RAPPUHN
WILLIS & KNIGHT
215 Second Avenue, North
Nashville, Tennessee 37201
(615) 259-9600

Attorneys for Petitioners

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

1. Whether abstention under *Younger v. Harris*, 401 U.S. 37 (1971), is appropriate where a facially conclusive claim of federal preemption over state regulation is presented.

2. Whether a state agency is estopped from asserting abstention under *Younger v. Harris*, 401 U.S. 37 (1971), where the state agency has failed to plead abstention, has urged the District Court to hold a hearing on the merits, has submitted a pretrial brief without mentioning abstention, has argued just prior to a full trial that the District Court should abstain under *Burford v. Sun Oil*, 319 U.S. 315 (1943), not *Younger*, and has stated prior to the trial's conclusion that abstention is no longer an issue.

3. Whether considerations of comity and federalism underlying *Younger* abstention are presented when a plaintiff voluntarily dismisses its appeal of a state administrative decision and attacks the administrative tribunal's actions in federal court as violative of federal statutory and constitutional law.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Federal Express Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 14, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit entered on February 14, 1991 (reprinted in the Appendix at A-1) is reported at 925 F.2d 962 (6th Cir. 1991). This opinion held that abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971)

was required and affirmed the District Court's dismissal of the case on abstention grounds. The District Court's opinion entered on April 23, 1990 (reprinted in the Appendix at A-16) is reported at 738 F. Supp. 1140 (M.D. Tenn. 1990).

The Court of Appeals' opinion entered on February 14, 1991, reflects the second time this case has been appealed. After a full trial on the merits, the District Court held in two opinions that it had no jurisdiction to entertain this case. (A-27), 693 F. Supp. 598 (M.D. Tenn. 1988). The Court of Appeals initially found that jurisdiction was lacking, (A-65) (unpublished opinion), 878 F.2d 381 (6th Cir. 1989) (Table); but later reversed itself finding jurisdiction, (A-69) (unpublished opinion), 909 F.2d 1483 (6th Cir. 1989) (Table).*

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 14, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(a).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49, § 1305(a)(1). (Reproduced in pertinent part.)

> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates,

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*For the Court's convenience, the prior opinions in this case are contained in this document as the Appendix (A). Other pertinent documents are contained in the Supplemental Appendix (SA).

routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

United States Code, Title 49, § 1302(b). (Reproduced in pertinent part.)

(b) Factors for all-cargo air service

In addition to the declarations of policy set forth in subsection (a) of this section, the Board, in the exercise and performance of its powers and duties under this chapter with respect to all-cargo air service shall consider the following, among other things, as being in the public interest:

(1) The encouragement and development of an expedited all-cargo air service system, provided by private enterprise, responsive to (A) the present and future needs of shippers, (B) the commerce of the United States, and (C) the national defense.

(2) The encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent, variety, quality, and price of such services.

(3) The provision of services without unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing.

Supremacy Clause of the United States Constitution, Article VI, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

the Constitution or Laws of any State to the Contrary notwithstanding.

Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3 (reproduced in pertinent part).

The Congress shall have power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

THE PARTIES

Federal Express Corporation filed this lawsuit against the Tennessee Public Service Commission and its three Commissioners, Keith Bissell, Frank Cochran, and Steven Hewlett. (*See* Complaint: SA-1). All of the defendants were represented by the Tennessee Public Service Commission's general counsel and all opinions in this case refer only to the Tennessee Public Service Commission. Accordingly, all references in this petition for the respondents are to the Tennessee Public Service Commission. Pursuant to Rule 29, Supreme Court Rules, Federal Express Corporation has no parent or subsidiary corporations other than wholly-owned subsidiaries.

STATEMENT OF THE CASE

This case presents the Court with several conflicting decisions from the circuits in the application of *Younger v. Harris* abstention in the context of state administrative proceedings and preemptive federal regulations. The Court of Appeals for the Sixth Circuit has taken a hard line in its opinion (A-1, 925 F.2d 962 (6th Cir. 1991)), mandating *Younger* abstention in a case where federal preemption of state regulation is clear-cut, where a full trial in federal court has taken place, where the state has, prior to trial, taken such positions as would under general principles of equity, require a finding of waiver or estoppel, and where, because of the

dismissal of state proceedings, no issues of comity or federalism remain. In so doing, the Sixth Circuit, purporting to apply its own precedent in *CSXT, Inc. v. Pitz*, 883 F.2d 468 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1480 (1990), has effectively "promulgated a hard and fast rule of abstention in all state administrative matters involving preemption."[1]

A. THE SUBSTANTIVE ISSUE — PREEMPTION OF STATE ECONOMIC REGULATION OF AN AIR CARRIER BY 49 U.S.C. § 1305

The substantive issue in this case is whether the Tennessee Public Service Commission may order Federal Express, a certificated air carrier, to file an application for a certificate of convenience and necessity as a motor carrier under the state motor carrier provisions contained in T.C.A. § 65-15-101, *et seq.*, thereby immediately initiating economic regulation of the Federal Express system. Federal Express contends that this regulation on its face "relates to [the] rates, routes, and services of an air carrier" which are exempted from all such state regulation by 49 U.S.C. § 1305, and the Supremacy and Commerce Clauses of the United States Constitution.

Federal Express employees sort over one million express delivery parcels each night during a critical three hour sort

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[1] In *CSXT, Inc. v. Pitz*, 883 F.2d 468, 475 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1480 (1990), the case upon which the Sixth Circuit's opinion in this case was based, the court stated that it was not promulgating a "hard and fast rule of abstention in all state administrative matters involving preemption."

process at the company's Memphis, Tennessee airport superhub.[2] These packages come from every state and many foreign countries, and timely completion of the sort is essential to the express delivery of these parcels throughout the fifty states and the world the next morning. To facilitate the sort, the Federal Express system handles every package uniformly. Uniform rates, uniform billing, uniform shipping documentation, and uniform scheduling on the tight airline schedule are imposed on all parcels to ensure expeditious handling. (See District Court's Findings: A-28-30; 693 F. Supp. at 599-600.)

Simply because of the location in Memphis of Federal Express' superhub, a very small number of parcels in the system are transported solely on the ground in Tennessee. The District Court found that less than .01 percent of the company's nightly express packages are transported in Tennessee by truck only, most of which have both an origin and destination in rural west Tennessee near Memphis. These few parcels are transported in the same trucks to and from the sort with thousands of interstate and air transported parcels and are indistinguishable from them. (See District Court's Findings: A-28-30; 693 F. Supp. at 599-600.) Yet, the Tennessee Public Service Commission seeks to regulate the rates, routes, and services of these ground-only Tennessee parcels while admitting that 49 U.S.C. § 1305 prohibits its regulation of any parcels that are transported at some point

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[2] The volume at the time of trial in this case was approximately 700,000 packages per night, the overwhelming majority of which had an origin and destination far away from Tennessee. The volume figure is now in excess of 1,000,000 and includes significant international routes also.

by air.[3] Accordingly, the Commission has ordered Federal Express to file a certificate of convenience and necessity to initiate the regulation process.

The imposition of this economic regulation by the Public Service Commission upon the rates, routes, and services of the *de minimis* Tennessee ground-only parcels necessarily impacts

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[3] As part of its air carrier service, Federal Express operates a fleet of trucks, all of which connect with aircraft and operate on a national airline schedule. (Tr. (September 10, 1987); pp. 41-64 (Doyle Cloud)). (Excerpted at SA-79-97.) The Commission admits that it cannot under 49 U.S.C. § 1305 generally regulate those trucks, all of which carry an overwhelming majority of packages that are transported by air at some point.

According to the Commission, if a truck were to contain 1,000 parcels originating in Jackson, Tennessee, 999 of which are ultimately destined for New York by airplane through Federal Express' Memphis superhub, only one of which is destined for Memphis through the same hub, the Commission's officers have a right to stop the truck, to require different documentation, different rates, and to impose further restrictions upon weights and the recipients of the parcels.

Indeed, the proof showed that trucks carrying no intrastate packages transported only on the ground in Tennessee have been stopped by the Public Service Commission on two previous occasions threatening late deliveries to hundreds of Federal Express' interstate parcels. (Tr. (September 10, 1987); pp. 109-110) (Excerpted at SA-98.)) In addition, the proof showed that the intervenor Purolator Courier Corporation which was historically a trucking company, had applied for a certificate of convenience and necessity, had submitted to regulation for many years, and had been greatly restricted by the Commission as to what it might carry, to whom it might make deliveries, and at what rate each parcel was transported. Indeed, Purolator admitted during the course of the hearings that it was violating its tariff in Tennessee because it simply could not comply with it. (Excerpts from Public Service Commission Hearings (September 4, 1986), pp. 10-21 (Glasscock) (SA-103-110); pp. 62-68 (Labrada) (SA-111-117); Tariff of Purolator Courier Corporation (Ex. 3 to September 10, 1987 Hearing) (SA-118-123.))

the operation of the Federal Express uniform air carrier system, as well as the thousands of other express parcels which are transported at some point by air. Federal Express therefore contends in this lawsuit that the Commission's actions are in direct violation of 49 U.S.C. § 1305, which prohibits all state regulation relating to "rates, routes, and services of an air carrier," and of the Supremacy and Commerce Clauses of the United States Constitution.

B. THE PROCEEDINGS BELOW

Federal Express Corporation filed this case in the United States District Court for the Middle District of Tennessee on August 7, 1987, to enjoin an order of the Tennessee Public Service Commission subjecting this air carrier to regulation of its rates, routes, and services, as a "motor carrier" under T.C.A. § 65-15-106.[4] Jurisdiction was based upon 28 U.S.C. § 1331 and § 1337. (Complaint: SA-1; Commission's Order, SA-9.)

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[4] T.C.A. § 65-15-106 reads in pertinent part as follows:

> Powers of public service commission.—
>
> (a) The public service commission is vested with power and authority, and it shall be its duty to:
>
> (1) License, supervise and regulate every motor carrier in this state, and to fix or approve the rates, fares, charges, classifications and rules and regulations pertaining thereto;
>
> (2) Regulate and supervise the schedules, service and method of operation of such motor carriers;
>
> (3) Require the filing of annual and other reports and any other data;
>
> (4) Require that the accounts and records of such motor carriers be kept and maintained in a manner consistent with good accounting practice; and
>
> (5) Supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.

(Footnote 4 continued next page)

Federal Express contended that the Commission's order was a violation of 49 U.S.C. § 1305 which prohibited any state regulation of an air carrier's rates, routes, or services, and of the Supremacy and Commerce Clauses of the United States Constitution. Federal Express requested declaratory relief and an injunction to prevent the Public Service Commission from beginning its economic regulation of the air carrier by requiring

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(Footnote 4 continued)

(b)(1) The commission shall designate enforcement officers charged with the duty of policing and enforcing the provisions of this part. . . .

. . .

(b)(3) Such enforcement officers upon reasonable belief that any motor vehicle is being operated in violation of any provisions of this part, shall be authorized to require the driver thereof to:

(A) Stop and exhibit the registration certificate issued for such vehicle;

(B) Submit to such enforcement officer for inspection any and all bills of lading, waybills, invoices or other evidences of the character of the lading being transported in such vehicle; and

(C) Permit such officer to inspect the contents of such vehicle for thepurpose of comparing same with bills of lading, waybills, invoices or other evidence of ownership or of transportation for compensation.

(b)(4) It shall be the further duty of such enforcement officers to impound any books, papers, bills of lading, waybills and invoices which would indicate the transportation service being performed is in violation of this part, subject to having the further orders of the court having jurisdiction over the alleged violation.

the company to file an application for certificate of convenience and necessity. (A-31-32, 693 F. Supp. at 601.)[5]

Prior to filing the action in District Court, Federal Express had filed an administrative appeal from the Public Service Commission in the Tennessee Court of Appeals. In order to protect its status as an integrated air carrier exempted from state regulation and operated pursuant to the encouragement and direction of Congress,[6] Federal Express asked the Public Service Commission and the Tennessee Court of Appeals to stay the order pending the appeal. The company asserted that its federally-protected integrated air carrier system would be irreparably harmed if it were required, during the pendency of the appeal, to file the application and submit itself to the state's regulatory agency that oversees and regulates the rates, routes, and services of motor carriers coming within its jurisdiction. (A-31-32, 693 F. Supp. at 601.)

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[5] To apply for a certificate of convenience and necessity, a motor carrier must provide, among other things, the following:

> (1) Full information concerning the ownership and financial condition of the applicant, and designation and description of the equipment proposed to be used;
>
> (2) The complete route or routes with designation of highways over which the applicant desires to operate, and the territory which the applicant desires to serve;
>
> (3) The proposed rates, schedule or schedules, or time cards of the applicant; and
>
> (4) In the case of the proposed contract haulers, a copy of the contract or contracts under which the applicant proposes to operate.

T.C.A. § 65-15-109(a)(1)(2)(3)(4).

[6] 49 U.S.C. § 1302(b).

The Public Service Commission did not act on the request for a stay. The Tennessee Court of Appeals refused to issue the stay, acknowledging but not resolving Federal Express' concern that submission to the jurisdiction of the Public Service Commission would impair its federal rights and moot its substantive appeal.[7] Because the Tennessee Motor Carrier Act provides no mechanism for filing such application under protest and because submission to the jurisdiction of the Tennessee Public Service Commission constitutes the beginning of Tennessee's economic regulation of Federal Express and the impairment of its federal rights, the company sought relief in District Court to prevent the immediate mooting of its appeal and the beginning of the piecemeal state regulation prohibited by Congress.

In District Court, an initial hearing on Federal Express' application for a temporary restraining order was held. The restraining order was granted. The court found that Federal Express had demonstrated the requisite likelihood of prevailing on the merits and that the company would be irreparably harmed if it were forced to submit to economic regulation before the substantial federal statutory and constitutional issues were heard. (Temporary Restraining Order: A-72-74.)[8] The case was set for a hearing on the preliminary injunction and both the Public

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[7] A court may not create a controversy where one no longer exists. Yet the Tennessee court wrote: "[S]uch application for stay be denied on condition that compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for review of said order." (Court of Appeals Order (August 6, 1987): SA-34.))

[8] The District Court wrote: "Submission to the jurisdiction of the Public Service Commission by filing an application may render moot the plaintiff's constitutional and federal statutory claims, and unduly interfere with and harm the plaintiff's alleged integrated transportation system developed under federal authority." (A-73.)

Service Commission and an intervenor, Purolator Courier Corporation,[9] answered the complaint and filed trial briefs without mentioning abstention. (Answer: SA-42; Trial Brief: SA-50), and moved for a speedy and consolidated trial on the merits pursuant to Rule 65, Federal Rules of Civil Procedure. (Motion and Memorandum in Support: SA-35-40.) Upon agreement of the parties at a status conference during which the court raised the abstention issue, the hearing on the merits was set for September 10 and 11, 1987.

Before the trial of this cause in District Court, Federal Express moved to dismiss its state court appeal for review of the Commission's order. The company took this action because the trial was proceeding on the defendants' motion for a speedy trial and because, as the District Court had found, the absence of a stay, which the Tennessee Court of Appeals had refused to grant, threatened to impair its federal rights and to moot the federal statutory and constitutional issues. After the dismissal and prior to the trial's conclusion, the Public Service Commission through its attorney stated:

> Your Honor, the abstention issue is no longer an issue in this case. There is no longer a pending state court decision. There is no longer any reason for you to await the outcome of that decision.

(Tr. (September 10, 1987): p. 214; SA-100.)

After the hearing on the merits, on June 16, 1988, the District Court held that it had no subject matter jurisdiction over the

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[9] Purolator Courier Corporation moved to intervene in this lawsuit as a defendant pursuant to Rule 24, Federal Rules of Civil Procedure. The District Court granted Purolator's motion to intervene at the beginning of the hearing on the merits. Purolator Courier Corporation subsequently withdrew from the appeal of this case and has not participated at the appellate level.

issues in this case pursuant to *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952). (A-27) 693 F. Supp. 598 (M.D. Tenn. 1988). On or about June 21, 1988, both Federal Express and the Commission moved the court to reconsider, asserting that jurisdiction was present under this Court's opinion in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). After argument, the District Court refused to reconsider and filed a second lengthy opinion, holding again that *Wycoff* and its progeny demanded dismissal of this case. (A-43) 693 F. Supp. at 607 (M.D. Tenn. 1988). The District Court found that the status quo should be maintained pending the appeal of the jurisdictional issue and restored the injunction against the Public Service Commission pending Federal Express' appeal.

Upon appeal, a panel of the Sixth Circuit initially found jurisdiction absent and ordered dismissal of the case. (A-65) 878 F.2d 831 (6th Cir. 1989) (Table). Upon Federal Express' petition for reconsideration *en banc*, the panel reconsidered its ruling, found that jurisdiction existed, and remanded the case for further consideration. (A-69) 909 F.2d 1463 (6th Cir. 1989) (Table).

Upon reconsideration the District Court held a short hearing concerning abstention. On April 23, 1990, the District Court entered an opinion abstaining pursuant to *Younger v. Harris*, 401 U.S. 37 (1971) and dismissing the previous preliminary injunction. (A-16) 738 F. Supp. 1140 (M.D. Tenn. 1990).

On February 14, 1991, the Court of Appeals reached its decision affirming the District Court's decision to abstain. The Court of Appeals held (1) that even if federal preemption of the Tennessee Public Service Commission's efforts to regulate an air carrier's rates, routes, and services is abundantly clear, abstention was nevertheless required; (2) that the Public Service Commission did not waive the abstention argument even though it had urged a trial on the merits, had failed to raise abstention in its answer, had later argued *Burford* abstention rather than

Younger abstention, and had asserted before the trial's conclusion that abstention was no longer an issue; (3) that the date of filing rule is an inflexible one for determining whether *Younger* abstention is required even if, at the time of trial, there is no ongoing state proceeding; and (4) that there was an adequate opportunity in the state proceedings to raise the constitutional and statutory preemption argument. Based on these findings, the court stated that abstention was required. (A-1) 925 F.2d 962 (6th Cir. 1991).

REASONS FOR GRANTING THE WRIT

I.

In Failing To Consider The Effect of Congress' Clear And Unambiguous Intention To Prelude Any State Regulation Of The Rates, Routes, And Services Of A Certificated Air Carrier, The Court Of Appeals Has Created A Conflict With The Ninth And Eleventh Circuits And Has Ignored This Court's Recognition In *New Orleans Public Service Commission v. New Orleans*, 105 L.Ed.2d 298 (1989) That *Younger* Abstention May Not Be Appropriate Where Preemption Is Clear-Cut

In *New Orleans Public Service Commission v. New Orleans*, 105 L.Ed.2d 298 (1989) *(NOPSI)*, this Court recognized a possible exception to the abstention doctrine expressed earlier in *Younger v. Harris*. 401 U.S. at 53-54. Where preemption of state action by federal statute is clear-cut and "facially conclusive", this Court recognized that abstention under such circumstances might not be appropriate. 105 L.Ed.2d at 316. *See also Public Utilities Commission v. Ohio United Fuel Gas Company*, 317 U.S. 456 (1943) (Where efforts to regulate prices patently invalid, injunction against state action issued).

Prior to *NOPSI*, both the Ninth and Eleventh Circuits had held abstention inappropriate where federal preemption of state action was deemed clear. In *Champion International Corporation v. Brown*, 731 F.2d 1406 (9th Cir. 1984), the Ninth Circuit Court of Appeals held that where "Congress has shown clearly its interest in uniform regulation of pension plans and its intention [through ERISA] 'to establish pension plan regulation as exclusively a federal concern'", Montana's efforts to enforce conflicting age discrimination laws were not appropriate for *Younger* abstention.

Similarly, in *Baggett v. Department of Professional Regulation*, 717 F.2d 521 (11th Cir. 1983), the Eleventh Circuit Court of Appeals held that the state's efforts to prosecute an operator of an enrolled vessel for intoxication were clearly preempted by federal statute and thus abstention was wholly inappropriate. In the Eleventh Circuit's words:

> When preemption is readily apparent, however, and, because of preemption, the state tribunal is acting beyond the lawful limits of its authority, "abstention can serve no principal of comity or of 'our federalism' ".

Baggett, 717 F.2d at 524 (quoting *Empire, Inc. v. Ashcroft*, 524 F. Supp. 898 (W.D. Mo. 1981)).

The situation presented in *Baggett* and *Champion*, and reserved by this Court in *NOPSI* is precisely the situation here. The preemption language in 49 U.S.C. § 1305 is all inclusive and absolutely prohibits economic regulation by any state entity of the activities of a certificated air carrier. The analysis of the preemptive effect of 49 U.S.C. § 1305 and the Supremacy Clause by the Commission in the administrative proceeding clearly exceeded its jurisdiction. *See Metropolitan Government of Nashville and Davidson County, Tennessee v. State Board of Equalization*, SA-156, (Tenn. App. 1988) (unpublished) (Administrative boards and agencies in Tennessee have no jurisdiction to decide constitutional issues).

The enactment or enforcement of any state law or regulation "relating to [the] rates, routes, or services of an air carrier" is specifically prohibited by 49 U.S.C. § 1305. Three recent cases cited but not applied by the Court of Appeals hold there is no room for any state regulation which impacts an air carrier's rates, routes, or services.

In the latest of these cases, *Transworld Airlines, Inc. v. Maddux*, 897 F.2d 773 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 307, 308

(1991), the Texas Attorney General contended that TWA's ticket price advertising was deceptive and violated Texas consumer fraud laws. Texas was joined by attorneys general from thirty-three other states in this claim. Together they claimed that § 1305(a) only preempted state regulation of the airline's rates, routes, and services, but did not expressly preclude state regulation relating to all airline operations such as advertising. *Maddux*, 897 F.2d at 779. TWA, joined by several other air carriers, responded that § 1305(a)(1) is to be read broadly and that "advertising of fares by airlines clearly relates to rates." The District Court agreed and enjoined the thirty-three attorneys general from enforcing state advertising statutes against the airlines. On appeal the Fifth Circuit affirmed, finding express preemption and also holding that there was no reason to balance any alleged harm to the states from the issuance of an injunction since the states had no interest to protect in light of the preemption. *Maddux*, 897 F.2d at 784.

The language in the Fifth Circuit's conclusion is particularly instructive:

> An examination of the preemption language in § 1305(a)(1) and its legislative history leads to the conclusion that Congress did intend to preempt so completely the particular area of state laws "relating to rates, routes, or services" *as to preclude state court actions*. Congress preempted this area to maintain uniformity and to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states. We agree with the First Circuit that Congress "did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989). Congress made this clear by including the express preemption provision in the Deregulation Act. The legislative history of § 1305 exhibits a

> Congressional intent to treat a complaint raising "this select group of claims" as necessarily federal in character. (Emphasis supplied.)

897 F.2d at 787.

The Congressional intent behind 49 U.S.C. § 1305 noted in *Maddux* is equally apparent here. Just as regulation of airline advertising by fifty different states inherently impedes the operation of air carriers which Congress sought to protect, the application of differing motor carrier standards of fifty states to the small number of intrastate parcels transported solely on the ground in each state necessarily impedes Federal Express' air carrier service and impacts its rates, routes, and services. The impact is direct and immediate, and accordingly under *Maddux*, preemption of both state agency and state court actions is clear.

Two other recent Court of Appeals cases support this reading of § 1305(a)(1). In *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990), a travel agency sued American claiming that its ban on advertising discounts on American Airline ticket prices violated the Sherman Act and the Illinois consumer fraud and deceptive practices statute. The Seventh Circuit affirmed the dismissal of the state law claims on the grounds that enforcement of the state statutes relates to rates "within the meaning of § 1305(a)(1)." The Seventh Circuit opinion demonstrates again that preemption is triggered when enforcement of the state law affects rates, routes, or services of an air carrier. Advertising by airlines, like the use of trucks by Federal Express, is an airline service.

In the third case, *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989), the First Circuit held that the Massachusetts Port Authority's attempt to raise landing fees at Logan Airport was preempted by § 1305(a)(1) because landing fees are "related to rates." Again, the First

Circuit was specifically concerned about the impact of inconsistent state and local regulations upon a national air carrier.

Thus, three Courts of Appeal have held that § 1305(a) is to be read very broadly, and clearly protects Federal Express' transportation activities from any state regulation impacting its rates, routes, and services. These opinions have also shown that § 1305(a) sets forth an unambiguous and facially conclusive claim of preemption.[10] When these cases are read alongside *Baggett* and *Champion*, which recognize that clear-cut claims of preemption are not appropriate for abstention, a conflict between the circuits is created. Accordingly, resolution by this Court of the issue reserved in *NOPSI* is necessary.

The Sixth Circuit Court of Appeals addressed but did not apply the exception to abstention reserved in *NOPSI* and applied by the other circuits. Instead, the Sixth Circuit in this case held fast to its previous ruling in *CSXT, Inc. v. Pitz,* 883 F.2d 468 (6th Cir. 1989), *cert. denied,* 110 S.Ct. 1480 (1990), that the presence of a preemption issue does not modify the abstention analysis, regardless of whether preemption is clear. (A-12) 925 F.2d at 968. This holding is in conflict with *Baggett* and *Champion, supra,* and calls for a resolution of the issue reserved in *NOPSI* by this Court.

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[10] It should be noted that a District Court in California has read Section 1305 very narrowly to include only "singularly airline services," and has thereby indicated that Section 1305 has no bearing on intrastate ground transportation in the state of California. However, the above cases were not supplied to the District Court when this opinion was written, and this case is now on appeal. *See Federal Express Corporation v. California Public Utilities Commission, et al.*, 723 F. Supp. 1379 (N.D. Cal. 1989).

II.

The Court of Appeals' Refusal To Bind The State To Its Previous Positions Regarding Abstention Threatens Judicial Resources And Calls Upon This Court To Exercise Its Supervision

The Court of Appeals' holding that this is not an appropriate case for application of the waiver doctrine combined with its repeated indications that *Younger* abstention may be raised *sua sponte* by the court come very close to raising *Younger* abstention to a jurisdictional level. This Court has made clear that abstention is not jurisdictional, but is an equitable doctrine which may be waived by state authorities. *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 479-80 (1977). Other circuits have also held that findings of waiver or estoppel are proper and that *Younger* abstention is not jurisdictional. *Universal Amusement Company, Inc. v. Vance,* 587 F.2d 159, 163, n. 6 (5th Cir. 1978), *aff'd* 445 U.S. 308 (1980) (*Younger* abstention is non-jurisdictional and may be waived); *First Fidelity Savings and Loan v. Greenwald,* 591 F.2d 417, 424-425 (1st Cir. 1979) (Commissioner's actions in not specifically arguing *Younger* abstention came close to waiving any claim that the District Court should abstain); *Midkiff v. Tom,* 702 F.2d 788, 803 (9th Cir. 1983), *rev'd sub nom on other grounds,* 467 U.S. 229 (1984) (Where abstention not addressed until the court raised the subject at oral argument, abstention was deemed waived); *Association of Community Organizations v. Municipality of Golden, Colorado,* 744 F.2d 739, 743, n. 2 (10th Cir. 1984) (State may waive the protection of *Younger* abstention and did so where state attorney asked for abstention on other grounds).

Here, the Court of Appeals found an abundance of facts supporting waiver or estoppel, yet refused to impose the equitable doctrines. The record reveals as follows:

1. The Commission did not plead abstention in its answer. (Answer: SA-42.)

2. The Commission did not file a motion requesting that the court abstain.

3. The Commission urged the District Court at a status conference to hold a speedy hearing on the merits of the case, accompanied by a brief which stated:

> If the court makes a decision on the merits of this case before August 25, 1987, no preliminary injunction will be necessary. . . .A consolidation will not prejudice the right of Federal Express to present its case and be heard on the merits. . . .Federal Express should have no problem presenting its case on the merits at a preliminary injunction hearing scheduled for August 20, 1987.

(Memorandum in Support of Motion to Consolidate Preliminary Injunction Hearing with Trial on the Merits, August 18, 1987: SA-35-41.)

4. The Commission filed a pretrial brief which never mentioned abstention and urged the court to examine the merits of the case and find for the Commission.

> Based on the foregoing arguments, defendants urge the court to find that Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle is subject to Commission regulation and to dismiss this case.

(Pretrial Brief, August 18, 1987: SA-70.)

5. After the District Court had raised abstention *sua sponte*, the Public Service Commission argued just prior to trial that the court should abstain under *Burford v. Sun Oil Company*, 319 U.S. 315 (1943), not *Younger v. Harris*, 401 U.S. 37 (1971). (A-7) 925 F.2d at 966; Supplement to Trial Brief (SA-72).

6. Before the conclusion of the trial, the Public Service Commission dropped its *Burford* abstention argument stating:

> Your Honor, the abstention issue is no longer an issue in this case. There is no longer a pending state court decision. There is no longer any reason for you to await the outcome of that decision.

(Tr. (September 10, 1987), p. 214: SA-100.)

7. The Commission raised its *Younger* abstention argument for the first time several months after trial of the case.

(Supplemental Brief of the Tennessee Public Service Commission, November 12, 1987: SA-72.)

For the Court of Appeals to hold that the Commission's actions and inactions do not constitute waiver or estoppel departs from the accepted and usual course of judicial proceedings where equitable defenses are raised. This departure, when added to the full trial that has taken place, significantly threatens the expeditious and economic functioning of our judiciary. The Sixth Circuit has effectively told state attorneys that no matter how late they raise abstention, how often they change their position regarding abstention, or how much time a court spends on their case before they finally decide to argue clearly that the merits should not be reached and the basis for their argument, they are never in jeopardy of waiving *Younger* abstention or in being estopped from raising *Younger* abstention.[11]

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[11] In *First Federal Savings and Loan v. Greenwald*, 591 F.2d 417 (1st Cir. 1979), the First Circuit held that the Commission's failure to argue abstention at the trial level came close to waiver of that claim. As the court stated: "To have to send this already decided case to another tribunal at this juncture would, especially under these circumstances, be an unwarranted waste of resources." 591 F.2d at 425 (*citing Provident Tradesmens Bank and Trust Company v. Patterson*, 390 U.S. 102, 126 (1968).

(Footnote 11 continued on next page)

Federal Express respectfully submits that if abstention is appropriate and the state truly is concerned about federal intervention in state proceedings it believes are ongoing, then this Court should exercise its supervisory role and place the burden on the state to see that this equitable defense is raised expeditiously and effectively.

III.

The Court of Appeals' Opinion Conflicts In Principle With The Fifth Circuit's Decision In *Thomas v. Texas State Board Of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987), Which Held That A Plaintiff Was Not Bound To Continue His Appeal Of A State Administrative Decision In State Court

The Court of Appeals has applied rigidly its "date of filing" rule and held that abstention was required since state proceedings were pending on the date the federal complaint was filed, even though the state proceedings were dismissed before trial. In so doing, the court has attempted to distinguish *Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987), stating that the plaintiff in *Thomas* dismissed his state appeal

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(Footnote 11 continued)

In *Provident Tradesmens Bank and Trust Company v. Patterson*, The Court stated regarding abstention:

> While we do not now declare that a Court of Appeals may never on its own motion compel dismissal of an action as an unwarranted intrusion upon state adjudication of state law, we do conclude that, this being a discretionary matter, the existence of a verdict reached after a prolonged trial in which the defendants did not invoke the pending state action should be taken into consideration in deciding whether abstention is the wiser course.

Provident Tradesmens Bank and Trust Company v. Patterson, 390 U.S. 102, 126 (1968).

before filing his federal complaint. (A-13) 925 F.2d at 962. This effort to distinguish *Thomas* fails because the policies set forth in *Thomas* apply equally to this case.

In *Thomas,* the Fifth Circuit reversed the District Court's decision to abstain from deciding plaintiff physician's claim attacking the state's revocation of his medical license. The plaintiff in *Thomas* initially pursued an appeal in state court and then dismissed the appeal seeking a determination of his federal constitutional claims in federal court. The Fifth Circuit stated:

> A person who contends that his constitutional rights have been violated by a state administrative proceeding is not required to resort to an appeal to state courts before seeking relief in a federal forum. At the time this suit was filed, no state action was pending. . . .
>
> Thomas [the plaintiff] did invoke state judicial relief, but he dismissed that suit before filing his federal action. A litigant who initiates state court review of a state administrative decision and then changes his mind and voluntarily dismisses his suit is not irrevocably bound either to continue his action in state court or to forfeit his right to vindicate his constitutional rights in the federal court. When no state proceedings are pending, federal action does not interfere with or insult state processes and "the policies on which the *Younger* doctrine is premised have little force. . . ."

807 F.2d at 456-57.

In refusing to apply *Younger,* the Fifth Circuit relied upon the longstanding precedent from the Supreme Court in *Bacon v. Rutland Rail Company,* 232 U.S. 134 (1914) relied upon by this Court in *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 610, n. 21 (1975), holding that a plaintiff need not exhaust his state court appellate remedies before challenging adverse state administrative decisions in federal court.

Here, as in *Thomas,* there are no considerations of comity present. A decision to dismiss an appeal is no different in this respect than a choice not to appeal. Deference to a state proceeding is not due when the "administrative proceedings have ended", and where "no state trial has taken place and no injunction against a pending state proceeding is sought." *Thomas, supra,* at p. 456.

Accordingly, Federal Express respectfully submits that the Court of Appeals decision in this case conflicts in principle with the Fifth Circuit's decision in *Thomas v. Texas State Board of Medical Examiners* and submits that this conflict should be resolved.

CONCLUSION

This case presents a compelling opportunity for this Court to clarify its decisions and to resolve conflicting decisions of other circuits regarding *Younger* abstention where federal preemption of state regulatory activities is an issue. It also presents a case where the Court's supervisory powers are called into action to prevent the waste of judicial resources that occurred in the full trial of this case, and in the entry of three separate District Court opinions and three separate appellate opinions prior to the filing of this petition.

Federal Express respectfully submits that the issues presented herein warrant the granting of this petition for certiorari.

Respectfully submitted,

WILLIS & KNIGHT
215 Second Avenue North
Nashville, TN 37201
(615) 259-9600

Attorneys for Federal Express Corporation

By: Marian F. Harrison

By: Jeffrey Rappuhn

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed on the 15th day of May, 1991 to Mr. Henry Walker, Tennessee Public Service Commission, 460 James Robertson Parkway, Nashville, TN 37219, who is counsel for all respondents.

WILLIS & KNIGHT

By: Marian F. Harrison

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APPENDIX A

FEDERAL EXPRESS CORPORATION,
Plaintiff-Appellant,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Defendants-Appellees.

No. 90-5596.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 23, 1991.
Decided Feb. 14, 1991.

Carrier brought action seeking declaration that Tennessee Motor Carrier Act was expressly preempted by Airline Deregulation Act and impliedly preempted by commerce clause. The United States District Court for the Middle District of Tennessee, Thomas A. Wiseman, Jr., Chief Judge, 693 F. Supp. 598, dismissed action for lack of subject matter jurisdiction, and carrier appealed. The Court of Appeals, 878 F.2d 381, affirmed. Carrier petitioned for rehearing en banc. The Court of Appeals, 909 F.2d 1483, reversed and remanded. On remand, the District Court, 738 F. Supp. 1140, dismissed action, and carrier appealed. The Court of Appeals, Milburn, Circuit Judge, held that: (1) Tennessee Public Service Commission had not waived abstention argument, and (2) abstention under *Younger* doctrine was appropriate.

Affirmed.

William R. Willis, Jr., Marian F. Harrison (argued), Willis & Knight, Nashville, Tenn., for plaintiff-appellant.

Henry M. Walker (argued), Tennessee Public Service Com'n, Nashville, for defendant-appellee.

Before KEITH and MILBURN, Circuit Judges, and CONTIE, Senior Circuit Judge.

MILBURN, Circuit Judge.

Plaintiff-appellant Federal Express Corporation appeals the judgment of the district court dismissing on grounds of abstention its action seeking a declaration that the Tennessee Motor Carrier Act, Tennessee Code Annotated § 65-15-101 *et seq.*, is expressly preempted by the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305, and impliedly preempted by the commerce clause, 738 F. Supp. 1140. For the reasons that follow, we affirm.

I.

Federal Express is a recognized leader in the overnight delivery business. "Approximately 90 percent of all packages transported by Federal Express are sorted at its Superhub in Memphis, Tennessee, the corporation's principal place of business." *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 693 F. Supp. 598, 600 (M.D. Tenn. 1988), *rev'd without opinion*, 909 F.2d 1483 (6th Cir. 1989) (table). "Of the more than 700,000 packages transported nightly, approximately 1000 have both an origin and destination in Tennessee." *Id.* "Federal Express estimates that it transports approximately 500 packages per night by motor vehicle solely within the state of Tennessee." *Id.*

On July 2, 1986, the Tennessee Public Service Commission (TPSC) directed Federal Express to show cause why it was not subject to the Tennessee Motor Carrier Act, Tenn. Code. Ann.

65-15-102. A hearing was held before an administrative law judge (ALJ) who ruled that Federal Express was a motor carrier under Tennessee law and was therefore required to apply for a certificate of convenience and necessity from the TPSC. The TPSC reviewed the ALJ's decision and following oral argument, the TPSC issued an order on June 9, 1987, ordering Federal Express to apply for a certificate of convenience and necessity to operate as an intrastate motor carrier. "The TPSC gave Federal Express 30 days to comply with its order, later extending that deadline to August 25, 1987." *Federal Express*, 693 F. Supp. at 601.

On July 9, 1987, Federal Express filed with the Tennessee Court of Appeals a petition for review of the TPSC's order and an application for an immediate stay of the order. On August 6, 1987, the Tennessee Court of Appeals denied the application for a stay of the TPSC's order. In its one-page order, the court stated that the application for a stay was denied "on condition that compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for review of said order." J.A. at 653.

On August 7, 1987, Federal Express filed the present action in the district court seeking declaratory and injunctive relief against the TPSC.[1] Federal Express argued that the Tennessee Motor Carrier Act was expressly preempted by the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305, and impliedly preempted by the commerce clause. Federal Express filed a motion for a temporary restraining order which the district court granted on August 10, 1987. The district court stated in its order that there was a substantial risk of irreparable injury to Federal Express "because submission to the jurisdiction of the Public

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[1] "Purolator Courier, a competitor with Federal Express that has complied with the Tennessee Motor Carrier Act, was permitted to intervene as a defendant." *Federal Express*, 693 F. Supp. at 601.

Service Commission by filing an application may render moot the plaintiff's constitutional and federal statutory claims, and unduly interfere with and harm the plaintiff's alleged integrated transportation system developed under Federal authorization." J.A. at 135-36.

On September 9, 1987, prior to the district court's hearing arguments on the motion for a preliminary injunction, Federal Express filed a motion to voluntarily dismiss its petition for review in the Tennessee Court of Appeals, which the court granted on September 11, 1987. Pursuant to a motion by the TPSC, the district court consolidated the hearing on the motion for a preliminary injunction with a bench trial on the merits, and the consolidated proceeding was conducted on September 11 and 12, 1987.

On June 16, 1988, the district court issued an opinion and order dismissing the case for lack of federal subject matter jurisdiction. *See Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 693 F. Supp. 598 (M.D. Tenn. 1988). The TPSC and intervenor Purolator Courier filed a motion for reconsideration, arguing that the court had jurisdiction pursuant to *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n. 14, 103 S. Ct. 1890, 2899 n. 14, 77 L.Ed.2d 490 (1983), but that the court should abstain from a decision on the merits. The court denied the motion and adhered to its decision dismissing the action for lack of jurisdiction.

Federal Express appealed the dismissal of its action and a panel of this court initially affirmed the judgment of the district court. *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 878 F.2d 381 (6th Cir. 1989) (unpublished opinion). However, Federal Express filed a petition for rehearing en banc, and the panel amended its original opinion and reversed the judgment of the district court. *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 909 F.2d 1483 (6th Cir. 1989) (unpublished order). The panel remanded the case for further proceedings

"including consideration of the question of abstention in view of this court's opinion in" *CSXT, Inc. v. Pitz*, 883 F.2d 468 (6th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1480, 108 L.Ed.2d 616 (1990).

On remand, the parties briefed the abstention issue, and following a hearing, the district court entered an order on April 23, 1990, dismissing the action on the basis of the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971). Using the three-step analysis for *Younger* abstention, the court first applied the day-of-filing rule to conclude that Federal Express' petition for review in the Tennessee Court of Appeals constituted an ongoing state judicial proceeding. Second, the court held that Tennessee has an important state interest in regulating the intrastate trucking industry. Third, the court concluded that Federal Express had an adequate opportunity to raise its constitutional concerns in the state proceedings. The court also held that the TPSC had not waived the abstention argument. Accordingly, the district court dismissed the case and dissolved the injunction against the TPSC. This timely appeal followed.

The principal issue on appeal is whether the district court erred by applying the *Younger* abstention doctrine.

II.

A. Waiver

Before reviewing the district court's application of the *Younger* abstention doctrine, we must address Federal Express' contention that the TPSC has waived the abstention argument. Federal Express argues that the TPSC waived any abstention argument because it did not plead abstention in its answer, it did not file a motion for abstention, it urged the district court to hold a hearing on the merits of the case, and at the hearing, counsel for TPSC stated that abstention was no longer an issue in the case since the

state court appeal had been dismissed. Federal Express asserts that the TPSC raised the *Younger* abstention argument for the first time two months after the bench trial when the district court asked the parties to brief the issue of res judicata. Thus, Federal Express contends that the TPSC waived the abstention argument by not actively pursuing the issue. *See City of Paducah v. Investment Entertainment*, 791 F.2d 463, 471 (6th Cir.) (Wellford, J., concurring), *cert. denied*, 479 U.S. 915, 107 S. Ct. 316, 93 L.Ed.2d 290 (1986).[2]

Younger abstention is "designed to allow the State an opportunity to 'set its own house in order' when the federal issue is already before a state tribunal." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80, 97 S. Ct. 1898, 1903-04, 52 L.Ed.2d 513 (1977). "If the State voluntarily chooses to submit to a federal forum, principals of comity do not demand that the federal court force the case back into the State's own system." *Id.* at 480, 97 S. Ct. at 1904. "[F]ailure to raise abstention could arguably amount to waiver of its application. . . ." *Hughes v. Lipscher*, 906 F.2d 961, 964 (3d Cir. 1990). However, in each case where the Supreme Court has found waiver of the abstention argument, "the State expressly urged [the] Court or the District Court to proceed to an adjudication of the constitutional merits." *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 626, 106 S. Ct. 2718, 2722, 92 L.Ed.2d 512 (1986).

In the present case, the abstention issue was first raised by the district court during a status conference on August 20, 1987. Although the TPSC did not plead abstention in its answer,

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[2] Federal Express' reliance on Judge Wellford's concurring opinion in *City of Paducah* is misplaced because in that case Judge Wellford concluded that the abstention issue had been abandoned on appeal, not waived by failure to raise it in the district court. Moreover, a concurring opinion has no binding authority.

Federal Express has cited no case requiring abstention to be raised in the pleadings. Indeed, the Supreme Court has indicated that "abstention may be raised by the court *sua sponte*." *Bellotti v. Baird*, 428 U.S. 132, 143 n.10, 96 S. Ct. 2857, 2864 n.10, 49 L.Ed.2d 844 (1976); *See also Louisiana Power & Light v. Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L.Ed.2d 1058 (1959).

After the district court raised the abstention issue, the TPSC filed a supplemental trial brief on September 2, 1987, arguing for abstention. However, in its brief, the TPSC argued for *Burford*-type[3] abstention rather than *Younger* abstention. At the outset of the consolidated hearing and trial before the district court on September 11-12, 1987, the district judge directed the parties to address the abstention issue. The TPSC urged the district court to abstain, arguing that abstention is appropriate where "there is an ongoing State proceeding where the Federal plaintiff has a chance to raise his constitutional issue. . . ." J.A. at 366. The TPSC cited *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 106 S. Ct. 2718, 91 L.Ed.2d 512 (1986), a case applying *Younger* abstention, to support its argument. Counsel for Federal Express had moved to dismiss its state court appeal on September 9, 1987, and counsel argued that the court should not abstain from hearing the case because there was no pending state action. Counsel for Federal Express argued that there was no basis for abstention under *Burford*, *Pullman*, or *Younger*. The district judge postponed consideration of the abstention issue and proceeded with the evidentiary hearing.

After receiving evidence and testimony on the merits, the court heard arguments from the parties on September 12, 1987, during which counsel for TPSC conceded that abstention was no longer an issue in the case because there was no pending state

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[3] *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L.Ed. 1424 (1943) (abstention to avoid conflict with a state's administration of its own affairs.)

court action. However, counsel for intervenor Purolator Courier argued that under the *Younger* doctrine the abstention issue remained alive until the Tennessee Court of Appeals acted on Federal Express' motion to dismiss its appeal. The court invited the parties to submit supplemental briefs, and on November 12, 1987, the TPSC filed a supplemental brief retracting counsel's concession at the hearing that abstention was no longer an issue in the case. The TPSC stated that further research had revealed that *Younger* abstention, rather than the *Burford*-type, was applicable to this case, and that the abstention issue was not mooted by Federal Express' dismissal of its state court appeal.

Our review of the proceedings in the district court reveals that the TPSC did not waive the abstention argument. As noted earlier, the TPSC was not required to raise abstention in the pleadings. When the district court raised the issue sua sponte, the TPSC argued for abstention. With the exception of the concession made by the TPSC at the hearing on September 12, 1987, which was retracted by its supplemental brief, the TPSC has persistently argued for abstention. Moreover, we view the TPSC's motion to consolidate the preliminary injunction hearing with a trial on the merits as a means of avoiding duplicative proceedings rather than a request for the court to reach the merits of the constitutional issue. Furthermore, it should be noted that on October 6, 1989, this court remanded this case to the district court for further proceedings including consideration of the question of abstention. Accordingly, we conclude that the TPSC did not waive the abstention argument.

B. Abstention

We conduct a *de novo* review of a district court's abstention decision. *Litteral v. Bach*, 869 F.2d 297, 298 (6th Cir. 1989) (per curiam); *Traughber v. Beauchane*, 760 F.2d 673, 676 (6th Cir. 1985). Generally, *Younger* abstention is appropriate only where a court can answer the following three questions in the affirmative:

> *[F]irst*, do [the relevant state proceedings] . . . constitute an ongoing state judicial proceedings; *second*, do the proceedings implicate important state interests, and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). Before applying the three-step analysis in the present case, we must address Federal Express' argument that abstention is inappropriate because Congress has preempted the regulation of air carriers by the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305.

In *CSXT, Inc. v. Pitz*, 883 F.2d 468, 471 (6th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1480, 108 L.Ed.2d 616 (1990), we faced the question of whether "the fact that this case raises preemption rather than other types of constitutional issues require[s] us to modify the classic abstention analysis?" We held that there was no "reason to analyze abstention cases involving a preemption claim differently than other abstention cases." *Id.* at 473. We concluded that when confronted with a preemption claim, a court need only ask two questions:

> whether the state court has concurrent judicial jurisdiction to decide the preemption question, and, if the answer to that question is "Yes, "whether a federal court should abstain in favor of ongoing state proceedings originating in the state regulatory agency.

Id. at 473-74.

Federal Express attempts to distinguish *CSXT* by arguing that the preemption language in the Airline Deregulation Act, 49 U.S.C.App. § 1305, "absolutely prohibits economic regulation by state agencies of the activities of a certified air carrier." Appellant's Brief at 20. The statutory language relied on by Federal Express states:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C.App. § 1305(a)(1). The key phrase is "relating to rates, routes, or services of an air carrier." *Id.* Federal Express relies on three recent decisions holding that the state regulation of an air carrier's rates, routes, or services was preempted by section 1305(a). *See Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.) (state regulation regarding advertising of airline fares preempted), *cert. denied*, ___ U.S. ___, 111 S. Ct. 307, 112 L.Ed.2d 261 (1990); *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751 (7th Cir. 1989) (same), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1948, 109 L.Ed.2d 311 (1990); *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989) (state scheme to impose landing fee preempted). In each case, the court construed the "relating to" language in section 1305(a)(1) broadly to find state action preempted.

In *Mattox* the court observed:

> An examination of the preemption language in § 1305(a)(1) and its legislative history leads to the conclusion that Congress did intend to preempt so completely the particular area of state laws "relating to rates, routes, or services" as to preclude state court actions. Congress preempted this area to maintain uniformity and to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states. We agree with the First Circuit that Congress "did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulations." *New England Legal Foundation*, 883 F.2d at 173. Congress made this clear by

> including the express preemption provision in the Deregulation Act.

Mattox, 897 F.2d at 787. Federal Express contends that its intrastate trucking system is "related to" its services as an air carrier, and, accordingly, section 1305 preempted the TPSC's regulation of its trucking system.[4]

Federal Express argues that since preemption under section 1305 is clear, the district court erred by abstaining from ruling on the merits. Federal Express attempts to distinguish *CSXT* by arguing that "the nature of the regulation in *CSXT* was so intertwined between state and federal governments that there was no clear argument that tensions cut in favor of federal rather than state action." Appellant's Brief at 19. Finally, Federal Express asserts that "prosecution of the state proceedings, particularly in the absence of a stay pending full appellate review 'threatens impairment of federal rights,' *CSXT*, 883 F.2d at 475, and begins the Balkanizing process of piecemeal regulation which Congress feared and sought to prevent through the enactment of § 1305(a)." Appellant's Brief at 24.

We reject Federal Express' argument against abstention on the basis of federal preemption.[5] In our view, Federal Express has failed to distinguish our ruling in *CSXT*. In *CSXT*, we held

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[4] The only court to address this specific issue reached the opposite conclusion. In *Federal Express Corp. v. California Public Util. Comm'n*, 716 F. Supp. 1299, 1302-03 (N.D. Cal. 1989), the court held that section 1305 did not preempt state regulation of Federal Express' intrastate trucking operation in California. This case is presently on appeal to the Ninth Circuit.

[5] The TPSC asserts that Federal Express did not raise this preemption argument in the proceedings before the district court on remand. However, we conclude that the preemption argument was adequately presented to the district court and we address the merits of the issue.

that the presence of a preemption issue would not modify the classic abstention analysis so long as the state court has concurrent judicial jurisdiction to decide the preemption question. "State courts normally have concurrent jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute." *CSXT*, 883 F.2d at 472. Section 1305 does not purport to restrict the *jurisdiciton* of state courts, and Federal Express has not shown that federal courts have exclusive jurisdiction to resolve preemption claims under the Airline Deregulation Act. Therefore, we hold that the Tennessee Court of Appeals had concurrent jurisdiction to address the preemption issues.

Before applying the three-part *Younger* analysis, we briefly address the implications of the Supreme Court's decision in *New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, ___ __ ___, 109 S. Ct. 2506, 2518-19, 105 L.Ed.2d 298 (1989), in which the Court held that while the *Younger* abstention doctrine may be applicable to administrative proceedings which are judicial in nature, it does not apply to administrative proceedings which are legislative or executive in nature. In *New Orleans Public Serv., Inc.*, the Supreme Court explained that a proceeding is judicial in nature when it "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." 109 S. Ct. at 2519 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 69, 53 L.Ed. 150 (1908)). In the present case, the district court concluded that the administrative proceedings were judicial rather than legislative, and Federal Express has not challenged this determination on appeal. Although the issue is not contested, we conclude that the district court properly determined that the administrative proceedings were judicial in nature. *See Sun Refining & Marketing Co. v. Brennan*, 921 F.2d 635, 639-40 (6th Cir. 1990). Accordingly, the three-part *Younger* analysis is applicable to this case.

The first inquiry under the *Younger* analysis is whether the state proceedings constitute an ongoing state judicial proceeding. The district court applied the day-of-filing rule to conclude that the underlying state proceedings were ongoing. Federal Express contends that there was no ongoing state proceeding which it sought to enjoin. Federal Express argues, "deference to a state proceeding is not due when the 'administrative proceedings have ended,' and where 'no state trial has taken place and no injunction against a pending state proceeding is sought.' " Appellant's Brief at 29 (quoting *Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453, 456 (5th Cir. 1987)). Federal Express also cites *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 n. 21, 95 S. Ct. 1200, 1210 n. 21, 43 L.Ed.2d 482 (1975), for the proposition that a party "aggrieved by a state administrative proceeding . . . may choose to seek judicial relief for his constitutional claims in a federal court and need not exhaust his state judicial remedies." Appellant's Brief at 27. Federal Express asserts that its decision to dismiss its appeal is no different than a choice not to appeal.

In *Zalman v. Armstrong*, 802 F.2d 199, 204 (6th Cir. 1986), we held "that the proper time of reference for determining the applicability of *Younger* abstention is the time that the federal complaint is filed." Under this rule, if a state proceeding is pending at the time the action is filed in federal court, the first criteria for *Younger* abstention is satisfied. *See Beltran v. California*, 871 F.2d 777, 782 (9th Cir. 1988). In the present case, state proceedings were ongoing because Federal Express' petition for review in the Tennessee Court of Appeals was pending on the date it filed the present action. Federal Express' reliance on *Thomas* is misplaced because in that case, the plaintiff dismissed his state suit before filing the federal action. *Thomas*, 807 F.2d at 457. Therefore, under the day-of-filing rule, Federal Express' subsequent dismissal of its state court action did not affect the abstention analysis. Federal Express' reliance on the footnote in *Huffman* is misplaced because the Court

stated that in those cases where exhaustion had not been required, the state judicial process had not been initiated. *Huffman*, 420 U.S. at 609 n. 21, 95 S. Ct. at 1211 n. 21. To the contrary, in the present case, Federal Express had initiated state judicial proceedings, and we hold that the state court proceedings were "ongoing" for purposes of *Younger* analysis.

The second inquiry under the *Younger* analysis is whether the state proceedings implicate important state interests. The district court held that this element of *Younger* was satisfied because Tennessee has an important interest in regulating intrastate trucking. Federal Express does not challenge the district court's ruling on this point. Accordingly, the second prong of the three-part test is satisfied.

The final inquiry is whether there was an adequate opportunity in the state proceedings to raise constitutional issues. The district court concluded that this element was satisfied because Federal Express' constitutional claims could have been raised in the pending state proceedings. Federal Express argues that it did not have an adequate opportunity to protect its federal statutory and constitutional claims because the state court refused to grant a stay of the licensing process. Federal Express contends that without a stay it would have to file an application for a certificate of public convenience and necessity with the TPSC, and it asserts that voluntary submission to the TPSC's jurisdiction would threaten to moot its federal constitutional and statutory claims.

Federal Express' argument misconceives the nature of the inquiry. The "pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. . . ." *Moore v. Sims*, 442 U.S. 415, 430, 99 S. Ct. 2371, 2381, 60 L.Ed.2d 994 (1979). "[T]he burden on this points rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.'" *Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (107 S. Ct. 1519, 1528, 95 L.Ed.2d 1 (1987) (quoting

Moore, 442 U.S. at 432, 99 S. Ct. at 2382). "[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Penzoil*, 481 U.S. at 15, 107 S. Ct. at 1528. In our view, Federal Express' assertion that its federal claims may be rendered moot without a stay fails to satisfy its burden of showing that state procedural law barred presentation of its claims.[6]

In *Watts v. Burkhart*, 854 F.2d 839, 847-48 (6th Cir. 1988), we held that judicial review under Tennessee's Uniform Administrative Procedures Act satisfies the third element of the *Younger* analysis because it provides sufficient opportunity to litigate constitutional claims. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 629, 106 S. Ct. 2718, 2724, 91 L.Ed.2d 512 (1986) ("[I]t is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding.") On the basis of our ruling in *Watts*, and in the absence of contrary authority from Federal Express, we hold that Federal Express had an adequate opportunity to litigate the constitutional issues in the state court. Accordingly, all three elements of the *Younger* analysis are satisfied, and we hold that the district court did not err by abstaining from reaching the merits of this case.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[6] We note that the Tennessee Court of Appeals denied Federal Express' request for a stay on condition that compliance with the TPSC's order would not prejudice judicial review of the order.

APPENDIX B

FEDERAL EXPRESS CORPORATION

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et. al.

No. 3:87-0633.

United States District Court,
M.D. Tennessee,
Nashville Division.

April 23, 1990.

Carrier brought action under the Federal Declaratory Judgment Act for declaration that Tennessee Motor Carrier Act was expressly preempted by the Airline Deregulation Act and impliedly preempted by the commerce clause. The District Court, 693 F. Supp. 598, held that it lacked subject matter jurisdiction over the action. On appeal, the Court of Appeals, 878 F.2d 381, (unpublished opinion), affirmed. On petition for rehearing, the Court of Appeals reversed and remanded. On remand, the District Court, Wiseman, Chief Judge, held that: (1) abstention under *Younger* by federal court was appropriate, and (2) state had not waived abstention argument.

Dismissed.

William R. Willis, Jr., Marian F. Harrison, Willis & Knight, and Jeffrey Rappuhn, Nashville, Tenn., for plaintiff.

Deputy Gen. Counsel, Henry Walker, Tennessee Public Service Com'n, Nashville, Tenn., for defendants.

Val Sanford, Gullet, Sanford, Robinson & Martin, Nashville, Tenn., and Peter A. Greene, Thompson, Hine & Flory, Washington, D. C., for purolator.

MEMORANDUM

WISEMAN, Chief Judge,

This matter is before the Court on remand from the Sixth Circuit Court of Appeals. The Sixth Circuit reversed this court's holding that it did not have subject matter jurisdiction to determine the merits of Federal Express' claim. *See Federal Express Corp. v. Tennessee Public Service Comm'n*, 693 F. Supp. 598 (M.D.Tenn. 1988), *aff'd* 878 F.2d 381 (6th Cir. 1989)(table), *rev'd on petition for rehearing*, No. 88-5974, Slip op. (6th Cir. 10/6/89). In remanding, the Sixth Circuit instructed this court to consider the question of abstention in view of *CSXT, Inc. v. Pitz*, 883 F.2d 468 (6th Cir. 1989).

CSXT held that traditional abstention analysis applies even where preemption is the primary constitutional question. 883 F.2d at 473. *See also New Orleans*, __ U.S. __, 109 S.Ct. 2506, 105 L.Ed.2d 298, *reversing* 798 F.2d 858 (5th Cir. 1986)(rejecting argument that presence of preemption question bars District Court from abstaining under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971)). Traditional analysis of whether Younger abstention is appropriate follows a three-step framework.

> [Abstention] is appropriate only where a court can answer all three of the following questions in the affirmative:
>
> > [F]irst, do [the relevant state proceedings] . . . constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.
>
> *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521, 73 L.Ed.2d 116 (1982).

CSXT, 883 F.2d at 474 (parallel citations omitted; brackets supplied in *CSXT*).

Federal Express' dispute with defendant, Tennessee Public Service Commission (TPSC), has had a lengthy sojourn in the state administrative process, resulting in TPSC issuing a Show Cause Order on June 9, 1987.[1] The Show Cause Order rejected Federal Express' challenges to the applicability and constitutionality of a state requirement that all intrastate motor carriers apply for a certificate of convenience and necessity, and affirmed an ALJ's decision that Federal Express was an intrastate motor carrier under Tennessee law and was required to obtain a certificate. The TPSC gave Federal Express thirty days to comply with its order, but later extended the deadline to August 25, 1987. Federal Express subsequently filed a petition for review and an application for a certificate pending state review of the order. The Court of Appeals denied the stay on August 6, 1987.

Federal Express filed its federal complaint on August 7, alleging, as it did in the state administrative proceedings, that the state regulations were expressly preempted by the Airline Deregulation Act of 1978 and impliedly preempted by the Commerce Clause. On August 12, Federal Express moved for entry of a preliminary injunction without further hearing or for delineation of the issues to be presented at the hearing. On August 18, defendant moved to consolidate the preliminary injunction hearing with a hearing on the merits. Two days later, this court consolidated the injunction hearing with the hearing on the merits, extended the TRO to September 10, 1987, the date set for the consolidated hearing, and invited the parties to brief the issue of whether abstention was appropriate. On September 9, the day

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[1] The facts underlying the dispute are set forth fully in this court's opinion on plaintiff's motion to reconsider dismissal for lack of subject-matter jurisdiction. *See* 693 F. Supp. at 600-03.

before the consolidated hearing, Federal Express dismissed its state appeal.

After hearing the matter on September 10 and 11, the Court granted the preliminary injunction for an indefinite period, took the decision on the merits under advisement, and requested additional briefs on the issue of abstention. Although the abstention issued was argued squarely in the hearing and in the pre- and post-trial briefs, the Court did not reach the issue because it found the prerequisite to abstention, subject-matter jurisdiction, lacking. The Sixth Circuit reversed that holding, however, compelling this court now to address the abstention issue.

Applying the traditional, three-step framework with sensitivity to the federalism concerns underlying *Younger* abstention, the Court finds that it must abstain from determining the merits of this dispute. Consequently, the Court dismisses plaintiff's claim and lifts the injunction against TPSC.

I. THE STATE PROCEEDINGS CONSTITUTE AN "ONGOING JUDICIAL PROCEEDING".

Where the state proceeding "investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist," it is judicial. *NOPSI*, __ U.S. at __, 109 S. Ct. at 2519, 105 L.Ed.2d at 318 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 69, 53 L.Ed. 150 (1908)). *Accord CSXT*, 883 F. 2d at 474. Both Federal Express and TPSC, agree, as they must, that the proceedings out of which this suit grew are "judicial," as defined in *NOPSI*. The more difficult issue is whether the proceedings are "ongoing" given that plaintiff has dismissed its state appeal.

As a general rule, the proper point of reference for determining whether state proceedings are "ongoing" is the date the federal complaint is filed. In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1,

107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), the Court applied the day-of-filing rule and held that abstention was appropriate, even though the state proceedings had run their course by the time the matter reached the Supreme Court and dismissal would leave Texaco without any state remedy. 481 U.S. at 17-18, 107 S. Ct. at 1529-30. Similarly, in *Zalman v. Armstrong*, 802 F. 2d 199 (6th Cir.1986), the court held that "the proper time reference for determining that applicability of Younger abstention is the time the federal complaint is filed." *Id.* at 204. The court vacated the District Court's judgment in favor of the federal plaintiff, even though the state criminal proceedings against him had been dismissed before the appeal was filed. *Id.* at 206-07. *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S. Ct. 1200, 43 L.Ed.2d 482 (1975) (rejecting argument that state judicial proceedings had ended by time federal complaint was filed); *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S. Ct. 1209, 1217, 39 L.Ed.2d 505 (1974) (holding that Younger principles did not apply where no state criminal proceeding is pending when federal complaint is filed); *Thomas v. Texas State Bd. of Medical Exam.*, 807 F. 2d 453 (5th Cir. 1987) (abstention not appropriate where plaintiff voluntarily dismisses state claim before filing federal suit).

Federal Express argues that insisting upon the day-of-filing rule in this case is merely a rote argument because the federalism concerns underlying *Younger* no longer applied after the state appeal was dismissed. Federal Express is correct in arguing that courts must apply the three-step framework with sensitivity to the concerns that animate the *Younger* rule. *See Zalman*, 802 F.2d at 202. But contrary to Federal Express' argument, applying the day-of-filing rule to this case properly balances those concerns.

The *Younger* line of authority is concerned primarily with respecting the sovereignty, integrity, and competence of state systems, and with allowing the state systems to operate without undue interference from the federal government. *See, e.g.,,*

Younger, 401 U.S. at 44, 91 S. Ct. at 750; *Huffman,* 420 U.S. at 601-04, 95 S. Ct. at 1206-08. This line of authority admonishes federal courts to refrain from intruding into the state process in a manner that "reflect[s] negatively upon the state court's ability to enforce constitutional principles." *Cf. Huffman,* 420 U.S. at 604, 95 S. Ct. at 1208; *Steffel,* 415 U.S. at 462, 94 S. Ct. at 1217. In determining whether particular actions improperly interfere with the state process, the Supreme Court has not distinguished between courts' decisions to issue injunctions against the state and litigants' decisions to forego available state remedies. For example, in *Huffman,* the Court held that proceedings are "on-going" and, absent exceptional circumstances, courts must abstain where a losing state litigant has failed to exhaust his state appellate remedies. 420 U.S. at 608-10, 95 S. Ct. at 1210-11. As explained in *NOPSI,*

> For Younger purposes, the state's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign. **For the same reason, a party may not procure federal intervention by terminating the state judicial process prematurely-foregoing the state appeal to attack the trial court's judgment in federal court.** '[A] necessary concomitant of Younger is that a party [wishing to contest in federal court the judgment of a state judicial tribunal] must exhaust his state appellate remedies before seeking relief in the District Court.' *Huffman,* 420 U.S. at 608 [95 S. Ct. at 1210].

__U.S. at __, 109 S. Ct. at 2518, 105 L.Ed.2d at 317 (emphasis supplied).

Given the system of judicial review of administrative proceedings established in Tennessee's Uniform Administrative Procedures Act, Tenn.Code. Ann. §§ 4-5-101 through 324, this

court finds no principled basis, for *Younger* purposes, to distinguish Tennessee's administrative proceeding-and-judicial review process from the state judicial systems contemplated in *Huffman* and *NOPSI*. Cf. __ U.S. __, 109 S. Ct. at 2518-19n. 5, 105 L.Ed.2d at 318 n. 4 (suggesting but not deciding that litigants who fail to exhaust their state judicial remedies may not challenge a state administrative finding in federal court). Both are entitled to the same respect from federal courts. Further, as the Supreme Court has intimated, whether federal litigations results in an injunction, or prompts litigants to short circuit the state process to move to a federal forum even though the litigants and the state have devoted resources to processing or adjudicating the claims, the integrity of the state system is disrupted. Thus, rather than mitigating the federalism concerns underlying *Younger*, plaintiff's voluntary dismissal of its state appeal on the eve of the hearing on the merits disrupts the state process and manifests disrespect for the state system's competence in precisely the manner that Younger and its progeny prohibit.

Another purpose of deferring to the state process is to provide the opportunity for narrowing constructions that might obviate constitutional problems and to avoid issuing advisory decisions based upon interpretations of state law that turn out not to be binding on the state courts. *See Pennzoil*, 481 U.S. at 11-12, 107 S. Ct. at 1526-27.[2] Permitting a plaintiff to cut off his state appeal

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[2] This concern is typically associated with abstention under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 (1941), rather than *Younger*. But, as the Supreme Court has stated, "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil*, 481 U.S. at 11 n. 9, 107 S. Ct. at 1526 n. 9. The concern that federal courts not act based upon non-binding interpretations of state law is but one of a complex of considerations that, under these circumstances, is relevant to determining whether abstention under *Younger* is appropriate.

in order to have a federal court hear his claim frustrates this concern.

Thirdly, *Younger* abstention has been crafted to avoid duplicative litigation and waste of judicial resources. *E.g., Younger,* 401 U.S. at 44, 91 S.Ct. at 750; *Steffel,* 415 U.S. at 462, 94 S. Ct. at 1217. Permitting a plaintiff to initiate the federal process while state proceedings are ongoing encourages undue forum shopping based upon last minute assessments of the federal and state proceedings, and frustrates this concern for judicial economy. Furthermore, if the state proceedings turn on questions of federal law, plaintiff may ultimately appeal to the United States Supreme Court. Thus, requiring a plaintiff under the circumstances presented to remain in state court preserves both judicial resources and plaintiff's right to present federal claims in a federal forum.

Therefore, the Court holds that the day-of-filing rule is both supported in the case law and appropriate in these circumstances. Applying that rule, the Court finds that the underlying state proceedings are "ongoing" for purposes of *Younger*. Therefore, the first step of the *Younger* analysis is satisfied.

II. REGULATING THE INTRASTATE TRUCKING INDUSTRY IS AN "IMPORTANT STATE INTEREST."

The importance of the state interest is not mitigated because of a potential preemption problem. *E.g., CSXT*, 883 F. 2d at 475. The importance of the generic proceedings to the state, not the outcome of a particular case, is what matters. *NOPSI*, __ U.S. __, 109 S. Ct. at 2516, 105 L.Ed.2d at 315. This circuit has applied Younger to such "important state interests" as the regulation of doctors, insurance companies, dentists, electric utilities, and railroads. *See Watts v. Burkhart,* 854 F. 2d 839 (6th Cir. 1988); *Blue Cross and Blue Shield of Michigan v. Baerwaldt,* 726 F. 2d 296 (6th Cir. 1984); *Parker v. Commonwealth of Ky. Bd. of Dentistry*, 818 F. 2d 504 (6th Cir. 1987); *American Electric*

Power Co. v. Kentucky Public Service Comm'n, 787 F. 2d 468. Tennessee's interest in regulating intrastate trucking is no less important, and satisfies this prong of the *Younger* analysis.

III. FEDERAL EXPRESS HAD AN ADEQUATE OPPORTUNITY TO RAISE ITS CONSTITUTIONAL CONCERNS IN THE STATE PROCEEDINGS.

Federal Express argues that the Court of Appeals' refusal to grant a stay of the licensing process threatened full judicial consideration of the statutory and constitutional issues. It does not claim that it did not have an opportunity to present its arguments. Rather, Federal Express contends that it could not have had a meaningful hearing before it would have had either to comply or to stop its trucks. This argument misses the point of the "meaningful opportunity" requirement.

In *Pennzoil*, Texaco argued that abstention was inappropriate because no Texas court could have heard Texaco's constitutional arguments within the limited time available to Texaco. The Court rejected the argument, holding that the burden rests upon Texaco "to show that 'state procedural law barred presentation of [its] claims.' " 481 U.S. at 14, 107 S.Ct. at 1528 (quoting *Moore v. Sims*, 442 U.S. 415, 432, 99 S. Ct. 2371, 2381-82, 60 L.Ed.2d 994 (197900. Thus, the pertinent issue is whether Federal Express' constitutional claims could have been raised in the pending state proceedings, not whether a decision would have been rendered in a timely manner. See Moore, 442 U.S. at 425, 99 S. Ct. at 2378 ("The pertinent issue is whether appellees' constitutional claims could have been raised in the state proceedings.") & at 430 n. 12, 99 S. Ct. at 2381 n. 12 ("[A]ppellees had an opportunity to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention.")

The Sixth Circuit has held that judicial review under Tennessee's Uniform Administrative Procedures Act provides

sufficient opportunity to litigate constitutional claims. *Watts v. Burkhart*, 854 F. 2d 839, 847 (6th Cir. 1988) (statute governing scope of review of expressly contemplates that a petitioner will be afforded the opportunity to raise constitutional issues). *Cf. CSXT*, 883 F. 2d at 473 (Merritt, J.) (specifically commending Tennessee Court of Appeals for analysis and decision on a preemption claim).

Thus, under *Pennzoil*, Federal Express's claim that the state court could not have heard the constitutional issue in time misses the mark and begs a demonstration that state procedures denied it the opportunity to litigate the constitutional issue. Under *Watts*, however, Federal Express cannot meet that burden. Therefore, this prong of the traditional abstention analysis has also been satisfied.

IV. TPSC HAS NOT WAIVED THE ABSTENTION ARGUMENT.

Although the analysis above supports *Younger* abstention, it would nevertheless be appropriate to decide the merits of plaintiff's claims if TPSC has waived the abstention argument. Abstention can be waived because "if the state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the Federal court force the case back to the State's own system." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80, 97 S. Ct. 1898, 1904, 52 L.Ed.2d 513 (1977). But mere failure to raise the abstention issue is not sufficient to waive it. *See Sosna v. Iowa*, 419 U.S. 393, 396, 95 S.Ct. 553, 555-56, 42 L.Ed.2d 532 (1975) (Supreme Court first to raise abstention issue); *CSXT*, 883 F.2d at 471 (abstention first raised by defendant-intervenor); *Louisiana Power & Light v. Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L.Ed.2d 1058 (1959)(district court has right to raise abstention issue sua sponte). *But see City of Paducah v. Investment Entertainment, Inc.*, 791 F. 2d 463, 471 (6th Cir. 1986) (Wellford, J.,

concurring)(city's failure to actively pursue abstention issue even after raising the issue in its answer amounts to waiver). To waive abstention, the State must voluntarily submit to federal jurisdiction and expressly urge the court to proceed to an adjudication of the merits. *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 626, 106 S. Ct. 2718, 2722, 91 L.Ed.2d 512 (1986). *Cf. Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 500 n. 9, 104 S. Ct. 3179, 3184 n. 9, 82 L.Ed.2d 373 (1984).

In this case, the state did not voluntarily submit to federal jurisdiction and urge this court to proceed to an adjudication of the merits. The state did move to consolidate the motion for a preliminary injunction with a hearing on the merits, but in its papers and through the hearing, the state continued to raise the abstention question and vehemently argued that this court did not have subject-matter jurisdiction over the dispute. TPSC's counsel did state in closing arguments that "abstention was no longer an issue" because Federal Express had dismissed its state appeal. But counsel expressly retracted the statement in the post-hearing brief and has continued to assert the abstention issue throughout this litigation. In short, TPSC has not waived the abstention argument.

CONCLUSION

For the reasons stated above, the Court finds that abstention under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971), is appropriate. Plaintiff's claim is dismissed and the injunction against defendant, TPSC, is lifted.

APPENDIX C

FEDERAL EXPRESS CORPORATION

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et. al.

No. 3-87-0633.

United States District Court,
M.D. Tennessee,
Nashville Division.

June 16, 1988.

On Motion to Reconsider Aug. 17, 1988.

Air carrier brought action under the Federal Declaratory Judgment Act for declaration that the Tennessee Motor Carrier Act was expressly preempted by the Airline Deregulation Act and impliedly preempted by the commerce clause. The District Court, Wiseman, Chief Judge, held that district court lacked subject matter jurisdiction over a declaratory judgment action which was brought primarily as a response to threatened state action in which federal preemption was raised as a defense. On defendant's motion to reconsider, the Court held that subject matter jurisdiction preceded ripeness and thus federal District Court could not hear case without subject matter jurisdiction.

Dismissed and motion to reconsider denied.

William R. Willis, Jr., Marian F. Harrison, Willis & Knight, Nashville, Tenn., Jeffrey Rappuhn, for plaintiff.

Donald L. Scholes, Deputy Gen. Counsel, Henry Walker, Tenn., Public Service Com'n, Nashville, Tenn., for defendants.

Val Sanford, Gullett, Sanford, Robinson & Martin, Nashville, Tenn., Peter A. Greene, Thompson, Hine & FLory, Washington, D.C., for Purolator.

MEMORANDUM

WISEMAN, Chief Judge.

I.

Federal Express Corporation created the small package air express business in which it is an acknowledged world leader, transporting well over 700,000 packages every night.[1] Virtually every package is processed through the Federal Express system in the same way: it is picked up by a courier, taken to an airport, flown to one of Federal Express' airport hubs, sorted with other packages bound for the same location, and then transported away from the hub by air or truck to its ultimate destination. During this process, Federal Express tracks only the destination, not the origin, of each package. Packages from every conceivable location are initially taken to one location where they are then sorted by destination only. Approximately 90 percent of all packages transported by Federal Express are sorted at its Superhub in Memphis, Tennessee, the corporation's principle place of business. To make the system both economical and efficient, the same sorting procedure is followed for every package, even when its origin and destination are very near each other. Hence, a package sent by Federal Express from one floor of a Manhattan Skyscraper to another was first flown to Memphis and sorted

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[1] The facts set forth in this opinion are derived from explanations given by A. Doyle Cloud, Vice President of Legal and Regulatory Affairs at Federal Express, in his testimony at the hearing for a preliminary injunction and in an affidavit. See Transcript of Hearing at 30-113, *Federal Express Corp. v. Tennessee Public Service Comm'n*, (3:87-0633); Complaint, Exhibit G, Affidavit of A. Doyle Cloud.

with all the other packages to be transported that evening. To operate this system, Federal Express employs 56 Boeing 727's, 19 DC-10's, a specialized fleet of feeder aircraft, and a motor vehicle fleet exceeding 16,000 vehicles. Federal Express is a certified air carrier operating under the grant of an all cargo authority issued by the Federal Aviation Act of 1958. Federal Express is also licensed as a motor carrier under the Interstate Commerce Act as an entity that holds itself out to the general public to provide motor transportation for compensation. See 49 U.S.C. § 10102(14).

Of the more than 700,000 packages transported nightly, approximately 1000 have both an origin and destination in Tennessee. Many of these Tennessee parcels are transported in exactly the same way other parcels are distributed: trucks pick up the parcels and take them to nearby aircraft; they are flown to Memphis and sorted; they are flown back to new destinations and ultimately delivered to the recipient by truck. Some Tennessee packages picked up near the Memphis hub, however, with destinations that are also near the hub are never transported by air. A courier picks them up, takes them by truck to the hub for sorting alongside other packages destined for points across the globe, and after sorting, takes them by truck to their destination. Under Federal Express' current highly structured systems, it is impossible for the courier who picks up the packages initially to know which of them will travel by air alone, which by motor vehicle alone, and which by a combination of air and ground transport. Using calculations derived after the fact, Federal Express estimates that it transports approximately 500 packages per night by motor vehicle solely within the state of Tennessee. These packages comprise less than 6 percent of Federal Express' Tennessee volume and less than .01 percent of Federal Express' National Volume.

The Tennessee Motor Carrier Act defines a motor carrier as follows:

> "Motor carrier," when used in this chapter, means any person, firm, partnership, association, joint stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without semitrailers attached, upon any public highway for the transportation of persons or property or both or for providing or furnishing such transportation service, for hire as a common carrier.

Tenn. Code. Ann. § 65-15-102(c). A motor carrier cannot operate as a common carrier between two points in Tennessee without first obtaining a certificate of convenience and necessity from the Tennessee Public Service Commission ("TPSC"). Tenn.CodeAnn. § 65-15-107. The TPSC has the power under Tennessee law to regulate motor carriers by approving rates, fares, charges, classifications, schedules, services, and modes of operation. Tenn.Code Ann. § 65-15-106. Federal Express has never obtained a certificate of convenience and necessity from the TPSC.

On July 2, 1986, the TPSC asked Federal Express to show cause why it was not subject to the Tennessee Motor Carriers Act.[2] Federal Express had a hearing before an Administrative Law Judge on July 23 and September 24 in which it argued against the TPSC's regulation of its operations. On February 24, 1987, the ALJ ruled that Federal Express was a motor carrier under Tennessee law and must apply for a certificate from the TPSC. TPSC reviewed the ALJ's order and heard oral argument from all the parties. After a review of the entire record, the TPSC affirmed the ALJ's decision and ordered Federal Express to apply for a certificate. On June 9, 1987, the TPSC issued a

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[2] For synopsis of the procedural history of this case before it reached this Court, *see* Complaint, Exhibit B, Show Cause Order against Federal Express Corporation.

twenty-five page Show Cause Order in which it set forth its findings of fact and conclusions of law. At the hearing Federal Express had argued, inter alia,[3] that section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305, expressly preempted any state from regulating the rates, routes, or services of a certified air carrier like Federal Express and that the Act impliedly preempted state law because it frustrated Congressional intent, interfered with the uniform national system Congress had fostered, and burdened interstate commerce. The TPSC gave Federal Express 30 days to comply with its order, later extending that deadline to August 25, 1987. The Tennessee Motor Carrier Act provides for judicial review of TPSC orders through the Tennessee state courts. Tenn.Code Ann. § 65-15-120; § 4-5-322. Alternatively, the TPSC may sue for an injunction in the state's chancery courts to enforce its orders against noncompliant parties. Tenn.Code Ann. § 65-15-121.

Federal Express filed a petition for review and an application for immediate stay with the Tennessee Court of Appeals. The company sought to delay its application for a certificate of convenience and necessity pending review of the TPSC's order. The Tennessee Court of Appeals denied the stay on August 6. On August 7, Federal Express filed a complaint in this Court.

In its complaint, Federal Express sought declaratory and injunctive relief against the TPSC, arguing that the Tennessee Motor Carrier Act was expressly preempted by the Airline

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[3] Federal Express also made two arguments before the Public Service Commission that were not included in its federal complaint: that postal regulations suspending the private express statutes preempted state regulatory authority over intrastate ground transport by entities like Federal Express that operate under the suspension; and that intrastate surface transport of mail by Federal Express is business conducted for the United States government and exempt from state regulation under Tenn.Code Ann. § 65-15-105. *See* Complaint, Exhibit B at 5.

Deregulation Act and impliedly preempted by the Commerce Clause.[4] Plaintiff's motion for a temporary restraining order, forestalling application for the certificate, was granted on August 10. On September 11 and 12, this Court heard arguments on the motion for a preliminary injunction. Purolator Courier, a competitor with Federal Express that has complied with the Tennessee Motor Carrier Act, was permitted to intervene as a defendant. The hearing was consolidated with a bench trial on the merits. After the first day of trial in this Court, Federal Express voluntarily dismissed its appeal in state court, apparently hoping to undercut any possibility of abstention. The Court heard the testimony of two Federal Express executives[5] as well as oral argument for two days, granted the preliminary injunction for an indefinite period, and took the decision on the merits under advisement.[6] The Court also requested additional briefs on the issues of abstention and res judicata which were duly submitted. Careful review of the record reveals that the following issues are before the Court.

1. Does this Court have subject-matter jurisdiction over Federal Express' claims?

2. If so, should the Court nonetheless abstain from deciding those claims?

3. Assuming that the Court has the power to decide this case and chooses to exercise that power, what preclusive effect must be given to decisions by a state administrative agency, the TPSC, concerning

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[4] Complaint, *Federal Express Corp. v. Tennessee Public Service Comm'n*, (3:87-633). Federal Express also made its interstate commerce argument a subject of the preemption issue in its trial brief. *See* Trial Brief of Federal Express Corporation at 28-33.

[5] The Court heard testimony from A. Doyle Cloud and from Frederick Wallace Smith, founder and CEO of the Federal Express Corporation.

[6] *See* Transcript at 227-228; Clerk's Resume for September 11, 1987.

a. its own jurisdiction;

b. its findings of fact; and

c. its conclusions of law.

4. If the plaintiff is not barred from this Court on res judicata principles, what are the results on the merits?

a. Does the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305, expressly preempt the Tennessee Motor Carrier Act and therefore prohibit TPSC from regulating Federal Express' intrastate motor carriage?

b. Does the Act impliedly preempt operation of the state regulatory scheme because the legislative history urges a uniform national air carrier scheme and because state regulation would unduly burden Federal Express' interstate operations?

Because the Court determines that under *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 73 S. Ct. 236, 97 L.Ed. 291 (1952) and its progeny the Court has no subject matter jurisdiction, only the first issue need be addressed.

II.

This is not a diversity case. Federal Express' principle place of business is in Tennessee and the TPSC is a Tennessee state administrative agency. This Court only has subject matter jurisdiction if, as Federal Express acknowledged in its jurisdictional statement, the case presents a federal question.

To determine whether the case arises under federal law, the well-pleaded complaint rule requires the court to examine the plaintiff's complaint, not to anticipate federal defenses. So for example, a federal court has no subject matter jurisdiction over

a case in which the plaintiff states a claim under state law and the defendant responds by raising a defense under federal law. *See Franchise Tax Bd.. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 10-11, 103 S. Ct. 2841, 2846-47, 77 L.Ed.2d 420, 430-31 (1983). According to the Holmes test, set forth in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 60 L.Ed. 987 (1916), in the vast majority of cases, a claim arises under the law that creates the cause of action. *See id.* 463 U.S. at 8-9, 103 S. Ct. at 2845-46.

In its jurisdictional statement, Federal Express seeks a declaratory judgment under 28 U.S.C. § 2201 and asserts federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337.[7] Federal Express' claims are said to arise under both a federal statute and the Constitution. The Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a) is entitled "Federal Preemption." It forbids any state to regulate the rates, routes, or services of a certified air carrier. This statute in combination with the Supremacy Clause, U.S. Const., art. VI, cl. 2, supports the express

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[7] It is axiomatic that the Constitutional requirements in Art. III § 2 that a case "arise under" federal law is broader than the requirement couched in almost identical language in 28 U.S.C. § 1331. The Supreme court has observed that it makes no such distinction between 28 U.S.C. § 1331 and 28 U.S.C. § 1337, however. *See Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 8, n. 7, 103 S. Ct. 2841, 2845, n. 7, 77 L.Ed.2d, 430 n. 7 (1983).

Section 1331 reads as follows:

> Federal Question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treatises of the United States.

Section 1337(a) reads in relevant part as follows:

> Commerce and antitrust regulations. The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . .

preemption prong of Federal Express' case. 49 U.S.C.App. § 1302(b) addresses policies underlying the Airline Deregulation Act, including the encouragement of an expedited all-cargo air service system responsive to the needs of shippers, United States' commerce, and the national defense. This portion of the Act in conjunction with the Commerce Clause, U.S. Const., art I, § 8, cl. 3 sets forth the implied preemption prong of Federal Express' case. Under the well-pleaded complaint rule and the Holmes test, a cursory review of plaintiff's complaint would appear to satisfy the mandates of 28 U.S.C. §§ 1331 and 1337 that the case "arise under" federal law.

This in not the usual case, however. It is an action for declaratory and injunctive relief. The unusual character of the declaratory judgment action is the lynchpin on which this decision turns.

Declaratory judgments are peculiar causes of action for several reasons. When the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, was first passed, Congress was concerned that the Act could unduly expand the subject-matter jurisdiction of the federal courts since a litigant seeking any declaration of rights and liabilities could point to the Act as creating a claim "arising under" a federal statute. Accordingly, the courts determined that merely seeking a declaratory judgment under the new statute could not alone create subject-matter jurisdiction. The litigant must allege an independent basis for the court's power to act apart from section 2201. *See Franchise Tax*, 463 U.S. at 15-19, 103 S. Ct. at 2849-51; *Annotation, Federal Question Jurisdiction in Declaratory Judgment Suit Challenging State Statute or Regulation on Grounds of Federal Preemption*, 69 A.L.R.Fed. 753, 757 (1984). Another oddity of the action for a declaratory judgment is that it often reverses the roles of the parties. A plaintiff in a declaratory judgment action frequently seeks to avoid being sued by having a court issue a preliminary determination of its rights. The declaratory plaintiff would have been

a defendant if the previously threatened suit had occurred. *See Franchise Tax* at 16, n. 14, 103 S. Ct. at 2850 n. 14, 69 A.L.R.Fed. at 757. Hence, the rule developed that if but for the availability of a declaratory judgment the declaratory plaintiff's claim would have arisen only as a defense to a cause of action brought by the declaratory defendant under state law, no subject-matter jurisdiction exists. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876, 94 L.Ed. 1194 (1950).

This rule has frequently been applied when the declaratory plaintiff asserts federal preemption as the basis for the court's subject-matter jurisdiction. At least three circuits, including the Sixth Circuit, have uniformly agreed that there is no federal subject-matter jurisdiction when federal preemption is raised as a defense to a threatened state action. *See Michigan Sav. & Loan League v. Francis*, 683 F.2d 957, 962 (6th Cir. 1982).[8]

The rule has its origin in an old Supreme Court case, *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 73 S Ct. 236, 97 L.Ed. 291 (1952), surprisingly similar in its facts to the case before the Court. Wycoff transported films and newsreels throughout the United States, including transport between points in Utah. The Utah PSC filed suit in state court to prevent Wycoff from continuing its intrastate commerce absent the PSC's regulation. Wycoff sought declaratory and injunctive relief in federal court. Hence, Wycoff was the defendant in the PSC's state court suit and the plaintiff in the declaratory judgment action. Wycoff argued that its intrastate operations were so integral to its interstate carriage that the district court should declare all of the Utah shipments were essentially interstate commerce, beyond the scope of the PSC's regulatory hand. *See*

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[8] *Accord, Madsen v. Prudential Federal Sav. and Loan Assoc.*, 635 F.2d 797 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018, 101 S. Ct. 3007, 69 L.Ed.2d 389 (1981); *First Nat'l Bank of Aberdeen v. Aberdeen Nat'l Bank*, 627 F.2d 843 (8th Cir. 1980).

id. at 239, 73 S. Ct. at 238. Wycoff also sought to enjoin PSC from interfering with its in-state transport, arguing that the PSC's attempt to halt the in-state-shipments was a burden on interstate commerce. *See id.*

The Supreme Court determined that Wycoff warranted neither an injunction nor a declaratory judgment because no justiciable controversy had yet been presented. Wycoff had not asked the court to determine that the PSC was without power to enter a specific order or take any concrete step; rather, both remedies sought to guard against the possibility that the PSC would attempt to prevent the intrastate shipments. *Id.* at 244, 73 S. Ct. at 240 (emphasis omitted). Wycoff was really using the Declaratory Judgment Act as a means to ward off the PSC's attempts to regulate it. In oft-cited dicta, the Court observed:

> In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. *Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court.* If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious *even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.* Federal courts will not seize litigations from state courts merely

> because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.

Id. at 248, 73 S. Ct. at 242 (citations omitted) (emphasis added). The Court added that it disapproved anticipatory declarations as to state regulatory statutes, even when rendered by state courts. *Id.* at 247, 73 S. Ct. at 242. State administrative bodies have the initial responsibility for making factual findings and issuing orders regarding state regulatory schemes; state courts have "the first and last word" about the meaning of state statutes. *Id.* Given this framework and the ample opportunity for judicial review of administrative decisions by the state courts and the Supreme Court, anticipatory declarations by a federal district court were viewed with even more distaste. *Id.*

The Sixth Circuit has adopted the approach of two other circuits in applying the *Wycoff* analysis to declaratory judgments in which preemption is said to be an independent basis for subject-matter jurisdiction. In *Michigan Sav. & Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982), the issue was whether federally chartered savings and loan associations in Michigan had to conform to the Michigan Mortgage Lending practices Act or whether the Home Owners Loan Act of 1933, a federal statute, preempted state law. Francis, Commissioner of the Michigan Financial Institutions Bureau, sent written notice to the savings and loans and warned them that they would be fined for failure to comply with the state statutory scheme. The savings and loans filed suit in federal court for a declaratory judgment that they were exempt from the state law and for an injunction preventing the Commissioner from regulating them under the state statutory scheme. The savings and loans argued that the federal act preempted state law and that compliance with both federal and state law would be impermissibly burdensome. *Id.* at 958-059.

The district court dismissed the case for lack of subject-matter jurisdiction, and the Sixth Circuit affirmed, quoting the lower court with approval.

> The actual controversy involved here is the application of a state statute and state regulations to the plaintiff associations. There is no controversy over the applicability of the federal regulations. Federal law arises in this case only as a preemption defense raised by the plaintiffs to the enforcement of the Act, which is the real controversy.

Id. at 960 (citation omitted). After a discussion of what it called the "*Wycoff* preemption problem," the Sixth Circuit adopted the rule that there is no federal jurisdiction where federal preemption is raised as a defense to a threatened state action. *Id.* at 962.

Shortly thereafter the Sixth Circuit reaffirmed the rule in *First Fed. Sav. & Loan Assoc. v. Detroit Bond & Mortgage Investment Co.*, 687 F.2d 143 (6th Cir. 1982). The issue in this case was whether federally chartered savings and loans had to comply with a state law making due-on sale clauses unenforceable. Again, the savings and loans sought a declaratory judgment that federal regulations preempted state law. Again the court affirmed the district court's dismissal of the claims for lack of subject-matter jurisdiction. The court observed that a recent Supreme Court decision revealed that the savings and loans were correct in asserting that federal lending laws preempted the state law at issue. But because the jurisdictional issue precluded consideration of the merits, dismissal was nonetheless appropriate. *Id.* at 145.

Another district court in our circuit has addressed the *Wycoff* preemption question as well. In *Michigan United Food and Comm. Wkrs. Unions v. Baerwaldt*, 572 F.Supp. 943 (E.D.Mich. 1983), rev'd 767 F.2d 308 (6th Cir. 1985), *cert. den.*, 474 U.S. 1059, 106 S.Ct. 801, 88 L.Ed.2d 777 (1986), the plaintiffs were

health and welfare benefit trust funds subject to ERISA[9] and insured by the Occidental Life Insurance Company. An amendment to the Michigan Insurance Code required that group disability insurance policies include a certain coverage for substance abuse; ERISA did not require this. Although the state took no action against the trusts or their insurer, the trusts sought declaratory and injunctive relief and argued that ERISA preempted application of the state law. *Id.* at 945. The trusts also argued that the state law was preempted by the National Labor Relations Act ("NLRA") because it interfered with bargaining between unions and their employers.

The district court rejected application of the *Wycoff* preemption doctrine for several reasons. No state action had been threatened to spur the declaratory plaintiffs into federal court. *Id.* at 946. Even if it had, the court observed, the insurance company, not the trusts, would have been the defendant in the state court suit. Hence, this case did not exhibit the kind of role reversal common to *Wycoff* and its progeny. Unlike other cases in which the Home Owners Loan Act had been at issue, ERISA had express language of preemption which the court found to be controlling.[10] Finally ERISA itself provided an independent

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[9] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

[10] *Id.* This part of the analysis is jarring in light of the Sixth Circuit's approach in *First Fed. Savings & Loan Asoc. v. Detroit Bond & Mortgage Investment Co.*, 687 F.2d 143 (6th Cir. 1982). In that case, the Sixth Circuit observed that a recent Supreme Court decision approving the declaratory plaintiff's preemption argument was not dispositive because the merits could not be reached before the jurisdictional issue. By making the "express language of preemption" in ERISA a factor in the *Wycoff* analysis, the district court seeks to put the cart before the horse. In any event, the Sixth Circuit reversed the trial court's preemption decisions.

alternative basis for jurisdiction in setting forth a cause of action for the trusts.[11] The district court found that the Michigan statute was preempted both by ERISA and the NLRA. The Sixth Circuit reversed the trial court on the preemption issues but did not address its *Wycoff* analysis. *See* 767 F.2d 308.

III.

The case before this Court is startlingly similar to those in which both the Supreme Court and the Sixth Circuit have said no subject-matter jurisdiction should exist.

In each instance, a state administrative agency took some action against the declaratory plaintiff and ordered it to comply with a state regulatory scheme. The Utah PSC had already filed suit in state court when the Wycoff Company brought its federal court suit; in Michigan Sav. & Loan, Michigan's Commissioner of Financial Institutions had ordered federally chartered savings and loans to comply with state law or face a fine. In our case, the TPSC has ordered Federal Express to apply for a certificate of convenience and necessity. Failure to apply in a timely way could prompt the TPSC to bring an action in chancery court to enforce its order.[12] *See* Tenn.Code Ann. § 65-15-121.

Federal Express could have appealed the TPSC's order to the Tennessee Court of Appeals. Instead, like other declaratory plaintiffs in *Wycoff* preemption cases, Federal Express sought to avoid state regulation of its intrastate ground carriage by changing its role as defendant in the administrative action to that of plaintiff in this Court. The arguments made by Federal Express

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[11] *See* 29 U.S.C. § 1132(a)(3), (f).

[12] Because the preliminary injunction has been continued until the Court reaches a decision, Federal Express' continuing failure to apply for a certificate is not yet untimely.

are like those of other declaratory plaintiffs who have asked for declaratory and injunctive relief against a state agency trying to regulate them. In *Wycoff*, the plaintiff said that its intrastate shipments should be characterized as interstate commerce and that regulation would burden interstate commerce. In *Michigan Sav. and Loan*, the declaratory plaintiff argued that federal law preempted the state statute and that compliance was unduly burdensome. In its complaint and in its arguments before this Court, the plaintiff argued that application of the Tennessee Motor Carrier Act was expressly preempted by the Airline Deregulation Act and impliedly preempted by the potential burden on interstate commerce posed by the TPSC's regulation.

The character of the threatened action by the TPSC is its attempt to enforce its existing order that Federal Express comply with the Tennessee Motor Carrier's Act by applying for a certificate of convenience and necessity, thus permitting the TPSC to regulate it. The defendants take an inconsistent position on this point, arguing that the threat has already passed because the administrative hearing is over and that no threat exists until particular regulations concerning Federal Express have been issued.[13] These positions are both inconsistent and overly formalistic. The analysis of the Sixth Circuit in *Michigan Sav. and Loan* is more to the point. There is no question about whether the Airline Deregulation Act applies to Federal Express. No one suggests that Federal Express is not a certified air carrier. The real issue in this case is whether the regulatory scheme set forth in the Tennessee Motor Carrier Act can be applied to Federal Express. If the procedural posture of the parties was

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[13] *Compare* Supplemental Brief of the Tennessee Public Service Commission on Abstention and Res Judicata at 14, n. 21 (the state action has already occurred) *with* Supplemental Brief of Purolator Courier Corp. as to Res Judicata and Abstention Issues at 23-25, Appendix A (burdens on Federal Express are hypothetical).

reversed and the TPSC sought a declaration of its rights under state law, Federal Express' arguments would arise only as a defense to the state law issue. This is not enough to create subject-matter jurisdiction.

This result is satisfactory for two other reasons. Even assuming that Federal Express' interstate commerce claim was neither an intrinsic part of its preemption argument nor that it arose solely as a defense to a state law claim, there would remain a real question as to whether that single issue would be ripe for the Court to decide. The Supreme Court dismissed Wycoff's claim precisely because the declaratory plaintiff was seeking to avoid the bare possibility that it might be regulated in a burdensome way. If a particular regulation imposed by the TPSC does result in a burden on interstate commerce, that question can be resolved when it arises. Further, this result comports with the deference entitled to state administrative decisions and state court review emphasized in *Wycoff*. Essentially, Federal Express is substituting this Court for a carefully devised avenue of appeal through the Tennessee Court of Appeals, the Tennessee Supreme Court, and the U.S. Supreme Court. *Wycoff* makes clear that state courts are bound equally with federal courts by the Federal Constitution and laws. See 344 U.S. at 248, 73 S. Ct. at 242. For this Court to encourage the maneuver employed by Federal Express in this case would undercut important principles of federalism.

Accordingly, the case is dismissed for lack of subject-matter jurisdiction. The preliminary injunction is dissolved.

ON MOTION TO RECONSIDER

I.

In its June 16, 1988 Memorandum and Order, this Court held that it has no subject matter jurisdiction over the issues in this lawsuit under the Sixth Circuit's rule in *Michigan Sav. & Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982). The Sixth Circuit in that case analyzed the Supreme Court's discussion in

Public Service Commission v. Wycoff Co., 344 U.S. 237, 73 S. Ct. 236, 97 L.Ed. 291 (1952) and explicitly held that there is no federal jurisdiction where federal preemption is raised as a defense to a threatened state action. 683 F. 2d at 962. The facts of the case before the Court have been set forth in its June 16 Memorandum[1] and will not be repeated in their entirety here. In an administrative action, the Tennessee Public Service Commission [TPSC] has determined that Federal Express Corporation engages in intrastate motor carriage and is therefore subject to regulation as a motor carrier under the Tennessee Motor Carriers Act, Tenn.Code Ann. § 65-15-101, et seq. Federal Express had unsuccessfully argued to the TPSC that the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305(a), preempted any form of state regulation. When the Tennessee Court of Appeals denied Federal Express' motion for a stay of the TPSC's order to apply for a certificate of convenience and necessity, Federal Express filed suit in this Court for declaratory and injunctive relief on the grounds of federal preemption. Applying the Sixth Circuit's Wycoff analysis, this Court held that the real issue in this case was whether the Tennessee Motor Carrier Act was applicable to Federal Express and that federal preemption arose only as a defense to that issue. Accordingly, the case was dismissed for lack of subject-matter jurisdiction.

Defendants Purolator Carrier and the Tennessee Public Service Commission moved the Court to reconsider its order and to abstain from a decision on the merits. At the hearing on the motion to reconsider, defendants urged that the Court had really abstained from the decision and misnamed the result.[2] Citing a First Circuit case in which an analysis similar to the Sixth Circuit's was questioned, *Colonial Penn Group, Inc. v. Colonial*

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[1] Memorandum of Law, *Federal Express Corp. v. Tennessee Public Service Commission*, No. 3-87-0633 (M.D.Tenn. June 16, 1988).

[2] Transcript of Hearing at 18, June 22, 1988.

Deposit Co., 834 F. 2d 229 (1st Cir. 1987), and a footnote in a Supreme Court case, *Shaw v. Delta Air Lines*, 463 U.S. 85, 96, n. 14, 103 S. Ct. 2890, 2899, 77 L.Ed.2d 490, 500 (1983), defendants argued that the Sixth Circuit's Wycoff analysis was inapplicable because Federal Express cited *Braniff Int'l Inc. v. Florida Public Service Comm'n.*, 576 F. 2d 1100 (5th Cir. 1978), as an analogous case and argued that the threat of irreparable harm to plaintiff mandated federal subject matter jurisdiction. While all the parties agreed that the Court had subject-matter jurisdiction,[3] they also agreed that the law in this area was difficult and unclear. The Court took the motion under advisement.

II.

A reexamination of *Wycoff*, 344 U.S. 237, 73 S. Ct. 236, 97 L.Ed. 291 (1952), only underscores its factual and legal similarity to this case. Like the TPSC, Utah's Public Service Commission said that a motor carrier was subject to state regulation because it engaged in intrastate commerce. The Commission had already filed suit in state court when Wycoff brought its federal action. Wycoff sought two forms of relief: a declaratory judgment that its intrastate transport was actually interstate commerce such that the Commission was preempted from regulating it; and an injunction restraining the Commission from any interference with Wycoff's business as an impermissible burden on interstate commerce. Wycoff held a certificate of convenience and necessity from the Interstate Commerce Commission and was therefore subject to a scheme of federal regulation.

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[3] It is well established that parties to a lawsuit cannot create subject-matter jurisdiction by stipulation where it does not otherwise exist. *See* Wright & Miller, 13 Federal Practice and Procedure, § 3522 at 66-68 (1984 & Supp. 1987); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites De Guinee*, 456 U.S. 694, 102 S. Ct. 2099, 2104, 72 L.Ed.2d 492 (1982); *In re Rini*, 782 F.2d 603, 608-09 (6th Cir. 1986).

Wycoff is often cited for its dicta about subject matter jurisdiction, but in fact the case was dismissed because it was not ripe. *See* 344 U.S. at 240246, 73 S. Ct. at 238-42. Wycoff had not yet been regulated by the Commission but was trying to guard against the possibility that it might be regulated in the future. *Id.* at 244, 73 S. Ct. at 240. No threat of irreparable harm had occurred to justify an injunction; similarly, lack of a real controversy reduced the claim for a declaratory judgment to a request for an advisory opinion.

The Supreme Court speculated. What if the harm had been immediate, the controversy real, the case ripe? Even then, the Court observed that it could not have heard the merits because subject-matter jurisdiction precedes ripeness. Subject-matter jurisdiction is the power of a federal court to hear a case properly before it. Without that power, even the most lively controversy simply cannot be heard in federal court.

The *Wycoff* doctrine says that where the complaint in an action for a declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action and not of the defense which will determine whether there is federal-question jurisdiction in the District Court. *Id.* at 248, 73 S. Ct. at 242. This is true even if the declaratory complaint sets forth a claim of federal right if that right is in reality a defense to the threatened cause of action. *Id.* In *Wycoff*, the fact that a suit had been filed in state court against the Public Service Commission did not constitute irreparable harm sufficient to justify an injunction; it did, however, correspond to the kind of threatened state court action that urges the state court defendant to seek relief as a declaratory plaintiff in federal court. The same facts that made injunctive and declaratory relief untenable in *Wycoff* also made subject-matter jurisdiction inappropriate. But this does not mean that the reverse is true: that whenever there exists irreparable harm, the federal court therefore has subject-matter jurisdiction over the

controversy. Instead, it is necessary to separate the threat for ripeness and injunctive purposes from the threat for jurisdictional purposes. In *Wycoff* the Court explained that even had the case been ripe (had the threat of harm from the Commission's regulations been real), *nonetheless* it probably would not have had subject-matter jurisdiction over the dispute (the threatened state action had in any event spurred the state court defendants to become declaratory plaintiffs). Ripeness does not preclude the jurisdictional inquiry.

Wycoff has never been overruled and has been recently cited by the Supreme Court with approval. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 16, n. 14, 103 S Ct. 2841, 2849, n. 14, 77 L.Ed.2d 420, 435 (1983). It has been described as an established Supreme Court tenet, Colonial Penn., 834 F.2d at 233 (1st Cir. 1987), and has spawned a split in the Circuits.

At least three circuits have held that when the declaratory plaintiff has a ripe controversy and seeks a declaration of federal law that has some meaning apart from a threatened state action, there is subject-matter jurisdiction even though the declaratory claim could also have been a defense to the state law action.[4]

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[4] *See Town of Springfield v. McCarren*, 549 F. Supp. 1134, 1138-39 (D.Vt. 1982), *cert. denied*, 464 U.S. 942, 104 S. Ct. 360, 78 L.Ed.2d 322 (1983), *citing First Federal Sav. & Loan Assoc. v. Greenwald*, 591 F.2d 417, 423 n.8 (1st Cir. 1979); *Braniff Int'l Inc. v. Florida Public Service Comm'n*, 576 F.2d 1100, 1104-06 (5th Cir. 1978); *Conference of Federal Sav. & Loan Assoc. v. Stein*, 604 F. 2d 1256, 1259 (9th Cir. 1979); *aff'd mem.* 445 U.S. 921, 100 S. Ct. 1304, 63 L.Ed.2d 754 (1980). *Stein* was distinguished by the Sixth Circuit in *Michigan Sav. & Loan v. Francis*, 683 F. 2d 957, 961-62 (1982), which declined to follow it. Similarly, a district court in our circuit explicitly declined to follow the First Circuit's decision in *Greenwald* and the Ninth Circuit's decision in *Stein*. *See Smart v. First Federal SAv. & Loan Assoc. of Detroit*, 500 F. Supp. 1147, 1159 (E.D.Mich. 1980)(rejecting argument that if an actual controversy exists. the court has jurisdiction), *aff'd First Fed. Sav.*

(Footnote 4 continued next page)

Other circuits hold that federal preemption can only be in the nature of a defense to a state court action and provides no independent basis for federal question jurisdiction in a suit for a declaratory judgment.[5] The Sixth Circuit falls into the latter category. Further, our Circuit has also applied the rule in cases in which both declaratory and injunctive relief were sought.

III.

The Sixth Circuit has interpreted *Wycoff* to mean that a regulated party like Federal Express that seeks declaratory and injunctive relief in federal court and argues a state law is preempted by a federal regulatory scheme lacks subject-matter jurisdiction in federal court. In *Michigan Sav. & Loan v. Francis*, 683 F. 2d 957 (6th Cir. 1982), federally regulated savings and loans sought a declaratory judgment and an injunction against application to them of a Michigan anti-redlining statute. Like Wycoff and like the plaintiff in this case, the savings & loans argued that a federal statute preempted state law and that compliance with state law would be impermissibly burdensome. Unlike the *Wycoff* Court, the Sixth circuit did not say the con-

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(Footnote 4 continued)

& Loan Assoc. v. Detroit Bond & Mortgage Investment Co., 687 F.2d 143 (6th Cir. 1982). *Cf. United Air Lines, Inc. v. Division of Industrial Safety*, 633 F. 2d 814 (9th Cir. 1980) (Denial of subject-matter jurisdiction in suit for injunction when allegations of federal question jurisdiction were really a defense to enforcement of state law), *cert. den.*, 454 U.S. 944, 102 S. Ct. 485, 70 L.Ed.2d 255 (1981)(J. White dissenting).

[5] *See Town of Springfield*, 549 F. Supp. at 1138-39, *citing Exxon Corp. v. Hunt*, 683 F. 2d 69 (3d Cir. 1982), *cert. denied*, 459 U.S. 1104, 103 S. Ct. 727, 74 L.Ed.2d at 961-62; *Lawrence County v. State of South Dakota*, 668 F.2d 27, 30-32 (8th Cir. 1982), *questioned in Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 105 S. Ct. 695, 83 L.Ed.2d 635 (1985); *cf. Madsen v. Prudential Federal Sav. & Loan Assoc.*, 635 F. 2d 797, 803-04 (10th Cir. 1980), *cert. den.*, 451 U.S. 1018, 101 S. Ct. 3007, 69 L.Ed.2d 389 (1981).

troversy was not ripe for adjudication; instead, the *Wycoff* doctrine was applied to dismiss the case for lack of subject-matter jurisdiction. As this Court discussed at length in its June 16 Memorandum, *Michigan Sav. & Loan* is directly on point: the procedural posture of the parties is identical; the relief sought is the same; and the legal arguments are very similar. This case has never been overruled. It is binding authority on this Court.

In at least three cases following *Michigan Sav. & Loan*, the Sixth Circuit has relied upon its *Wycoff* analysis to dismiss cases for lack of subject-matter jurisdiction. None of those cases are as closely analogous to this case as are *Wycoff* and *Michigan Sav. & Loan*. Yet, in a wide variety of contexts, the Sixth Circuit has applied its *Wycoff* analysis without qualification.

In *First Fed. Sav. & Loan Assoc. v. Detroit Bond & Mortgage Investment Co.*, 687 F. 2d 143 (6th Cir. 1982), federally regulated savings and loans sought a declaratory judgment that a state law making due-on sale clauses unenforceable was preempted by federal law. Plaintiffs did not seek an injunction. The Sixth Circuit reaffirmed that it lacked subject-matter jurisdiction over the case under the rule in *Michigan Sav. & Loan*, despite the existence of a Supreme Court case that favored the plaintiffs on the merits. Although the existence of federal jurisdiction in these situations is a close question, "the law of this circuit is that there is no federal jurisdiction where federal preemption is raised as a defense to a threatened state action." 687 F. 2d at 145.

The *Wycoff* doctrine has been applied in other kinds of cases as well. In *City of Saginaw v. Service Employees Int'l Union*, 720 F. 2d 459 (6th Cir. 1983), a union appealed a declaratory judgment that the arbitral award rendered to it against the employer was unenforceable because it violated the Comprehensive Employment Training Act [CETA].[6] The union had

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[6] Comprehensive Employment Training Act, 29 U.S.C. §§ 801, *et seq.*

already sued in state court to enforce its contractual award. On appeal, the Sixth Circuit dismissed for lack of subject-matter jurisdiction. Usually, section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts any cause of action under state law whatsoever, such that dismissal under the *Wycoff* analysis, which looks to the character of the threatened state court action, would be inappropriate. In this case, however, the employer did not fall within the federal definition of an "employer" for purposes of section 301. Since the threatened state court action therefore could arise only under state law, federal law was implicated only as a defense to the union's claim. Citing a then recent Supreme Court case, the Court observed that an action could "arise under" state law and preclude federal question jurisdiction even if the state action involved a federal defense, including the defense of preemption, even if the defense was anticipated in the state court complaint, and even if both parties admitted that the federal defense was the only real issue in the lawsuit. *See* 720 F. 2d at 462, n. 5, citing *Franchise Tax*, 463 U.S. at 14, 103 S. Ct. at 2848.

In *Bell & Beckwith v. United States, I.R.S.*, 766 F. 2d 910)6th Cir. 1985), the Sixth Circuit applied its *Wycoff* rule to interpleader actions. A brokerage firm filed an action for interpleader when the I.R.S. levied a tax lien on an investment account managed by the firm and when the alleged owner of the account demanded payment as well. A United States Magistrate distributed the account to the I.R.S., and the owner appealed. The Sixth Circuit reversed and remanded with instructions to dismiss the case for lack of subject-matter jurisdiction. In its *Wycoff* analysis, the court scrutinized what the declaratory defendants to the interpleader action could have claimed as plaintiffs in a state court action. *See* 766 F. 2d at 915-917. The nature of the threatened action determines whether a federal question is involved. The Court observed that application of a Wycoff analysis does not always lead to dismissal. In patent cases, for

example, the infringer typically brings an action for a declaratory judgment in federal court in anticipation of the patent owner's claim. Examination of the threatened action by the patent owner, however, reveals that this claim also would necessarily arise under federal law. Because the nature of the threatened action by the patent owner would arise under federal law, the fact that the owner happens to have been brought into federal court as a defendant in a declaratory judgment action does not preclude federal question jurisdiction. The infringer is not obtaining access to federal court indirectly when it could not have obtained it directly. In these unusual kinds of cases, *Wycoff* analysis supports, and does not undercut, subject-matter jurisdiction. *See* 766 F. 2d at 913; *Franchise Tax*, 463 U.S. at 19, n. 19, 103 S. Ct. at 2851 n. 19. This result did not occur in *Bell* however. After concluding that the actions each defendant could have brought against the broker and among themselves would have arisen under state law, the court dismissed the suit for lack of subject-matter jurisdiction.

District courts in this circuit have also applied the Sixth Circuit's *Wycoff* analysis. In *ANR Pipeline v. Conoco, Inc.*, 646 F. Supp. 439 (W.D. Mich. 1986), a natural gas distributor had sought a declaratory judgment in state court that its performance of offshore contracts should be excused. Conoco, the defendant producer, sought removal to federal court, arguing that all offshore contracts were governed by federal law.[7] The district court observed that ANR went to state court to get an anticipatory defense to any claim Conoco might bring for breach of contract. 646 F. Supp. 447-48. But ANR had not engaged in artful pleading, disguising what was really a defense to a federal claim in state law rubic. Any claim Conoco could have brought for breach—i.e., the threatened action —would have arisen under state and not federal law. Hence, removal was inappropriate.

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[7] The Outer Continental Shelf Lands Act ["OCS-LA"], 43 U.S.C. § 1331 *et seq.*

In another case from the Eastern District of Michigan, the court applied a *Wycoff* analysis and concluded that subject-matter jurisdiction over plaintiff's claim existed. *Michigan United Food & Comm. Wkrs. Union v. Baerwaldt*, 572 F. Supp. 943 (E. D. Mich. 1983), *rev'd on other grounds*, 767 F. 2d 308 (6th Cir. 1985), *cert. den.*, 474 U.S. 1059, 106 S. Ct. 801, 88 L.Ed.2d 777 (1986), has been discussed in detail in the Court's June 16 Memorandum and will only be briefly addressed here. In this case, an employee benefit trust sought both a declaratory judgment and an injunction against the state's insurance commissioner when a recently enacted state law was in apparent conflict with ERISA.[8] The regulated party sought both kinds of relief against a state regulatory entity and argued federal preemption as the basis for the court's subject-matter jurisdiction. The district court did not disregard Wycoff but applied its rule to conclude that subject-matter jurisdiction existed. Because the district court's jurisdictional finding was based on four separate rationales[9] and because the Sixth Circuit declined to comment on any of them, it is impossible for this Court to discern which of these reasons the Court of Appeals approved.

The history of *Wycoff* applications in our circuit since the *Michigan Sav. & Loan* decision has been traced to show how deeply entrenched this analysis has become. Both *Wycoff* and

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[8] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

[9] Grounds relied upon by the Michigan district court included the following: there had been no state agency action against which the trust sought to create an anticipatory defense; if the agency had so acted, the trust would not have been the defendant in that action; ERISA is unique both because of its express preemptive language and because it provides a separate cause of action (and basis for jurisdiction); and unlike Wycoff's case, this dispute was ripe. *See Michigan United Food and Comm. Wkrs. Unions v. Baerwaldt*, 572 F.Supp. 943 (E.D.Mich. 1983), *rev'd on other grounds*, 767 F.2d 308 (6th Cir. 1985), *cert. den.*, 474 U.S. 1059, 106 S. Ct. 801, 88 L.Ed.2d 777 (1986).

Michigan Sav. & Loan are directly on point; *Wycoff*'s facts are virtually identical to those in this case. Neither case has been overruled: to the contrary, both have engendered their own body of caselaw. The later Sixth Circuit cases can be distinguished from our facts because the plaintiff's did not seek an injunction, as in *First Federal*, or because they are not actions against state regulatory agencies, like *ANR Pipeline*.[10] In the subsequent district court case that contains both of these elements, it is clear that the Sixth Circuit believed subject-matter jurisdiction existed but unclear why it believed this. Since the 1982 decision in *Michigan Sav. & Loan*, this Circuit as well as district courts within it have continued to rely upon Wycoff and even to apply it to very different kinds of cases, such as *Bell*. Hence, this Court is bound by the reasoning in both *Wycoff* and *Michigan Sav. & Loan*, both of which are still good law in this Circuit.

IV.

Interestingly, the parties in this case have not cited to additional Sixth Circuit authority to support their position that the Court has subject-matter jurisdiction over their dispute.[11] Instead, they turn to cases from other Circuits and urge the Court to adopt the rules therein. Plaintiff relies on *Braniff Int'l Inc. v. Florida Public Service Comm'n*, 576 F.-2d 1100 (5th Cir. 1978), and defendants cite *Colonial Penn Group Inc. v. Colonial Deposit Co.*, 834 F. 2d 229 (1st Cir. 1987).

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[10] In fact, these cases were omitted from the Court's original Memorandum precisely because of such dissimilarities.

[11] Defendants say that both *First Federal* and *Michigan Sav. & Loan* were solely suits for declaratory judgments, although the latter case from which the Sixth Circuit rule is derived was an action for both declaratory and injunctive relief. See Defendant's Memorandum of Law in Support of Defendant's Motion to Reconsider at 2. Plaintiff distinguishes the Sixth Circuit line of cases in a sentence, stating that no indication of irreparable injury was present in them. See Response to Defendant's Motion for Reconsideration at 608-609.

Braniff is a Fifth Circuit case decided four years before the Sixth Circuit's decision in *Michigan Sav. & Loan.* It bears a factual similarity to this case. In *Braniff*, six airlines sought a declaratory judgment and an injunction against the Florida Public Service Commission, which had issued a show cause order requiring the airlines to comply with state law. A Florida statute gave the Commission the power to disapprove changes in rates, fares, or schedules within the state; the Commission's rule required air carriers to file notice of their intrastate changes in rates, fares, and schedules.[12] The airlines argued, inter alia,[13] that the state regulation was preempted under federal law and that it was an undue burden on interstate commerce. 576 F. 2d at 1102. After the district court dismissed the case under *Wycoff*, the Fifth Circuit reversed.

The Court of Appeals asked the extent to which *Wycoff* restricted a federal court from hearing a constitutional challenge to a state statute. Essentially, *Wycoff* was distinguished on two grounds. According to *Braniff*, Wycoff had never challenged the constitutionality of a state statute or administrative ruling, as the airlines had. *Id.* at 1103. Further, the state entity had not acted in *Wycoff*, according to the Court, whereas in *Braniff* the state had issued a show cause order. The threat of irreparable harm, which was lacking in *Wycoff*, confirmed that the case was ripe for decision.[14] The airlines were not merely seeking to ward off

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[12] *See* FlaStat. § 330.53 (1973); FlaAdmin. Code, Rule 25.15-50.

[13] In addition to their preemption and interstate commerce arguments, the airlines also argued that the state attempts to regulate them violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. *Braniff*, 576 F. 2d at 1102.

[14] Note that the Fifth Circuit determined only that the case was ripe and subject-matter jurisdiction existed-it did not reach the issue of whether an injunction was appropriate, but only observed that it was not foreclosed. *See* 576 F. 2d at 1105. In fact, the district court had denied the request for a stay or a preliminary injunction. *See id.* at 1102, n. 4.

possible action by the PSC at some future date: the regulation had been enacted and the show cause order issued. *Id.* at 1105. Hence, subject-matter jurisdiction was present The Court held that when a party seeks injunctive and declaratory relief based upon the unconstitutionality of a state statute and where there are no other impediments to federal question jurisdiction, the fact that the constitutional claim might be raised as a defense before the state administrative entity does not deprive the court of jurisdiction. 576 F. 2d at 1106.

Despite the similarities between *Braniff* and the facts of this case, important differences remain. First, the preemption arguments are critically dissimilar. In *Braniff*, the airlines argued that the state statute and administrative rules specifically enacted to regulate the rates, fares, and schedules of air carriers were unconstitutional in their entirety and from their inception. Hence, no order issued from the state agency to the airlines to enforce those rules was considered proper. By contrast, Federal Express is much more like Wycoff company, that wanted to prevent the Commission's regulation before it had begun. Federal Express does not argue that the Tennessee Motor Carrier Act regulating intrastate ground carriage is unconstitutional ab initio but that its application to an air carrier is.[15] It does not claim that no cause of action may ever be brought under the Act but that it cannot be enforced against Federal Express.[16] The only requirement imposed by the TPSC's order as it now stands is that Federal

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[15] Essentially, Wycoff also claimed that a state regulatory scheme not yet in existence was preempted by the Supremacy Clause. The Fifth Circuit's assertion that this was not a constitutional challenge reads out the entire basis for Wycoff's suit.

[16] *Cf. Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 26, 103 S. Ct. 2841, 2844, 77 L.Ed.2d 420, 441 (1983) (Through ERISA could preclude enforcement of the State's tax levy in this case, the cause of action to enforce the levy under state law was not itself preempted by ERISA).

Express apply for a Certificate of Convenience and Necessity, submitting to regulations TPSC could issue in the future. It is a kind of preamble to the regulatory scheme already in place in *Braniff*. Like the Utah Public Service Commission in *Wycoff*, the TPSC has not yet issued a single regulation concerning integrated carriers. The declaratory plaintiff is seeking to ward off the possibility that it might be unconstitutionally regulated in the future, not to challenge a constitutionally deficient law already in place. Echoing the *Wycoff* court, even if Federal Express is engaged solely in interstate commerce, the Court cannot say that there is nothing whatever that the State may require. *Wycoff*, 344 U.S. at 245, 73 S. Ct. at 241 (1952). When the request is not for preliminary findings and conclusions intended to fortify the litigant against future regulation, it would be a rare case indeed in which the relief should be granted. Id. at 246, 73 S. Ct. at 241.

Further, the Fifth Circuit's analysis of the state agency's action in *Wycoff* seems somewhat misplaced. The Utah Commission *had* taken action against the regulated party by bringing suit in state court. Similarly, in this case the TPSC has conducted a hearing that required Federal Express to show cause why the Tennessee Motor Carrier Act should not apply to it. In *Wycoff*, the Supreme Court said that the state court action on these particular facts[17] was not enough to create the kind of irreparable harm to jusify an injunction, but it was precisely enough to spur Wycoff into federal court as a declaratory plaintiff. *Id.* at 245, 248, 73 S. Ct. at 241-43. Thus, the inquiry into the state's action or the threatened harm has separate aspects, injunctive and jurisdictional. The Court underscores this by explaining that

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[17] In its complaint, Wycoff had sought both an injunctive and a declarotory judgment but had apparently abandoned the former claim on appeal. Nonetheless, the Court explained why an injunction would have been inappropriate. *See Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 73 S. Ct. 236, 97 L.Ed. 291 (1952).

even if the case had been ripe, subject-matter jurisdiction would have been questionable.

> Since this case should be dismissed in any event, it is not necessary to determine whether, on this record, the alleged controversy over an action that may be begun in state court would be maintainable under the head of federal-question jurisdiction. But we advert to doubts upon that subject to indicate the injury that would be necessary if this case . . . rested merely on [a] threatened suit in state court . . . [T]his suit cannot be entertained as one for injunction and should not be continued as one for a declaratory judgment.

Id. at 248-249, 73 S. Ct. at 242-43. Hence, the fact that Federal Express obtained a preliminary injunction which has now been dissolved does not confer subject-matter jurisdiction on the parties. These are two separate inquiries. The issue of jurisdiction precedes the issue of the harm to Federal Express. This Court cannot reach the merits of th controversy unless it has the power to do so, assuming the dispute is ripe for adjudication.

The Fifth Circuit in *Braniff* admits that its real concern is that a plaintiff not be allowed, by asserting a defense to impending or threatened state action, to proceed under the fountainhead of federal-question jurisdiction in a case which could not otherwise be heard in federal court. *Braniff*, 576 F. 2d at 1105, emphasis added. The court was apparently reformulating the *Skelley* doctrine: if but for the availability of a declaratory judgment the declaratory plaintiff's claim would have arisen only as a defense to a cause of action brought by the declaratory defendant under state law, no subject-matter iurisdiction exists. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S Ct. 876, 94 L.Ed. 1194 (1950). In this case, the state court action anticipated by the complaint is that the TPSC will attempt to enforce its show cause order against Federal Express under Tenn.Code Ann. § 65-15-121. Preemption is an issue that Federal Express would raise as

a defense to the operation of the Tennessee Motor Carriers Act. Such a case could not be removed to this court because federal law would arise only as a defense. *See Franchise Tax,* 463 U.S. 1, 103 S. Ct. 2841, 77 L.Ed.2d 420. *See also, ANR Pipeline,* 646 F. Supp. 439. If the lawsuit could not have come to federal court through the front door of removal, it also cannot come to federal court through the back door of the Federal Declaratory Judgment Act.

Despite *Braniff*'s facial similarity to this case, it is not persuasive authority. The basis for preemption in both cases is different. *Braniff*'s analysis of *Wycoff* is problematic. Most importantly, *Braniff* adopts a view of *Wycoff* that is counter to that adopted in more recent case law in this circuit. Accordingly, *Braniff* is not controlling in this case.

At the hearing on the motion to reconsider, defendants cited *Colonial Penn Group Inc. v. Colonial Deposit Co.*, 834 F. 2d 229 (1st Cir. 1987), as a case in which a Circuit Court had reevaluated its *Wycoff* analysis. The facts are dissimilar to those before the Court,[18] and the First Circuit affirmed the district court's dismissal of the lawsuit for lack of subject-matter jurisdiction. *Id.* After tracing the history of *Wycoff* the court distinguished cases in which the plaintiff challenges a state regulatory scheme applicable to it and the defendant is a state official. Id. at 236-

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[18] *Colonial Penn* was not an action in which a regulated entity sought relief from a regulating agency on preemption grounds. In state court, a local bank sued Colonial Penn and its subsidiaries for a declaratory judgment and an injunction alleging unfair competition and trademark infringement under state common law. The declaratory defendants in state court filed suit in federal court, arguing that they were entitled to declaratory and injunctive relif[sic] under the Lanham Act, 15 U.S.C. § 1121. The court concluded that because the second action was only a defense to the original state law action, jurisdiction was lacking. 834 F. 2d at 236. This was true even though the Lanham Act issues might be the central feature of the case. *Id.*

238. Concurrent jurisdiction was said to be available to the plaintiff to determine whether a federal statute preempted the state regulation. Because the facts in *Colonial Penn* did not fall within that definition the court observed that what it called the exception to the *Wycoff* rule did not apply. *Id.* at 236-238.

Because the *Colonial Penn* court did not have similar facts before it, the First Circuit did not have to reach the issue of how to decide a case like this one, although the Court's dicta indicates it would acknowledge subject-matter jurisdiction. More importantly, the difficulty with carving out this exception to *Wycoff* is that the exception restates *Wycoff*'s facts but reaches an opposite result. Wycoff too sought to avoid state agency regulation. Wycoff sought a declaration that its business was interstate in character and an injunction forbidding interference. The facts in *Michigan Sav. & Loan* may be characterized in the very same way. When the *Wycoff* Court expressed doubt about its subject-matter jurisdiction in just such a case, and when neither case has ever been overturned, this Court must be bound by their teachings.

It is no secret that the Circuits are split in their applications of the Wycoff dicta.[19] But resolution of these conflicts is not a matter to be addressed by this district court.

V.

The most serious challenge to this Circuit's *Wycoff* rule are footnotes in a series of Supreme Court opinions following *Wycoff*. These footnotes are problematic because they cite *Wycoff* with approval but suggest a gloss on the case that appears

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[19] *See supra* notes 3-4. *See also, Annotations, Federal Question Jurisdiction in Declaratory Judgment Suit Challenging State Statute or Regulation on Grounds of Federal Preemption*, 69 A.L.R. Fed. 753 (1984 & 1986 Suppl.).

to contradict Wycoff itself. Further, the footnotes are dicta that are not controlling in the cases in which they appear.

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 77 L.Ed.2d 420 (1983), a state statute[20] required an employee's vacation trust to pay withholding taxes to the state. When the trust refused to pay, the tax board sued in state court to collect the taxes under state law. The trust, arguing that application of state law was preempted by ERISA, sought to remove the lawsuit to federal court. In a unanimous opinion, the Supreme Court held that a federal district court had no subject-matter jurisdiction to hear such a case.

After a thorough discussion of the Holmes test and the well-pleaded complaint rule,[21] the Court explained that application of the rule may seem awkward when neither the obligations of state law nor defendant's failure to comply are disputed, and the parties admit that the only real question for resolution is the defense of preemption. See 463 U.S. at 12, 103 S. Ct. at 2848. Yet, subject-matter jurisdiction was not present when preemption arose as a defense to obligations that were created by state law without reference to federal law. *Id.*[22] This meant that the tax

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[20] Cal.Rev. & Tax Code Ann. §§ 18817-18 (West Supp. 1983).

[21] The Holmes test says that a claim usually arises under the law that creates the cause of action. *See American Well Works Co. v. layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 60 L.Ed. 987 (1916). Under the well-pleaded complaint rule, examination of the complaint alone and not the defense determines whether a claim arises under federal law. *See Franchise Tax*, 463 U.S. at 10-11, 103 S. Ct. at 2846-47. Not every federal issue creates a federal question.

[22] The Court further explained that "by unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution . . . because prohibited thereby." *Franchise Tax*, 463 U.S. at 12, 103 S. Ct. at 2848. This does not mean that no federal court will ever hear the federal preemption defense, however, because the state court's decision may be subject to Supreme Court review. *Id. cf. Wycoff*, 344 U.S. at 247-48, 73 S. Ct. at 242-43 (ultimate recourse may be had to the Supreme Court if a state court has denied a federal right).

board's first cause of action under the California Tax Code arose under state law and could not be removed. Not only did this characterization of the claim meet the Holmes test, it conformed to common sense as well.

> California law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law. The well-pleaded complaint rule was framed to deal with precisely such a situation.

Id. at 13, 103 S Ct. at 2848. (citation omitted). The tax board's second cause of action was more difficult to characterize. Preemption was a necessary ingredient to the tax board's claims under the California Declaratory Judgment Act. The Court applied the *Skelley* rule[23] to state declaratory judgments and asked if but for the availability of the declaratory judgment the federal claim would have arisen solely as a defense to a state-created action. Id. at 18, 103 S. Ct. at 2850. Hence, the Court examined what would have happened if the trust rather than the tax board had originally brought the lawsuit.

Had the trust initially sued in state court, the Court observed, removal might have been appropriate because ERISA gives it an express cause of action. Alternately, the trust "*might* have been able to obtain federal jurisdiction under the doctrine applied *in some cases* that a person subject to a scheme of federal regulation may sue in federal court to enjoin application . . . of conflicting state regulations . . . ." *Id.* at 20, n. 20, 103 S. Ct. at 2851 n. 20 (emphasis added). The trust's cause of action would have arisen under federal law because it sought to enforce a federal right. By

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[23] *See Skelley Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876, 94 L.Ed. 1194 (1950).

contrast, the State had no federal right for which protection had been sought. Ready access to its own enforcement machinery meant it had no need for access to a federal forum. *Id.* at 20-22, 103 S. Ct. at 2851-53. Therefore, while the trust might have brought the lawsuit under the second claim in federal court, the state could not. Accordingly, removal was inappropriate. *Id.* In *Franchise Tax*, the Court twice cited its *Wycoff* decision with approval. See id. at 16, n. 14, 103 S. Ct. at 2850 n. 14 and at 19, n. 19, 103 S. Ct. at 2851 n. 19.

The case before this Court is similar to *Franchise Tax* in that it involves a prior administrative action to enforce a state statute from which the regulated party claims an exemption under federal law. It is distinct in the procedural posture of the parties. As in *Wycoff* and *Franchise Tax*, the Court has considered what kind of action the declaratory defendant could bring. In this case, the TPSC could sue to enforce its order under Tenn.Code Ann. § 65-15-121. Federal Express would raise the issue of federal preemption as a defense. Unlike ERISA, the Airline Deregulation Act would give Federal Express no cause of action for enforcement of its provisions. Federal Express argues not that federal law preempts a cause of action under state law (so that, as in patent cases, the case would arise under federal law no matter who brought it) but that it preempts application to it of an otherwise valid state law.[24] The tentative language of footnote 20 in *Franchise Tax*, which the Court did not rely upon as controlling, is unpersuasive in light of the direct language on point in *Wycoff* and *Michigan Sav. & Loan*. Federal Express seeks to assert no federal cause of action but in essence claims a federal defense to operation of a state statute that, like the California Tax

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[24] If a federal *cause of action* completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily arises under federal law. *Franchise Tax*, 463 U.S. at 24, 103 S. Ct. at 2854 (emphasis added).

Code, established a set of conditions without reference to federal law. Hence, *Franchise Tax* supports the result of this Court's June 16 memorandum.

Language that echoes the Supreme Court in *Franchise Tax* may also be found in two later footnotes. *Shaw v. Delta Air Lines*, 463 U.S. 85, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983) determined that a portion of New York state law[25] concerning pregnancy benefits was preempted by ERISA. In footnote 14, the Court said that when a regulated party seeks injunctive relief from state regulation on the ground that the regulation is preempted by federal law, a federal question is presented. 463 U.S. at 96, 103 S. Ct. at 2899. *Shaw* does not discuss *Wycoff*. Similar language appears in *Lawrence County v. Lead-Deadwood School District* No. 40-1, 469 U.S. 256, 105 S. Ct. 695, 83 L.Ed.2d 635 (1985), in which a South Dakota county refused to distribute the federal revenues it received as compensation for its tax immune properties according to a state statutory scheme.[26] The case came to the Supreme Court through a state court action in which the county argued that the federal Payment in Lieu of Taxes Act, 31 U.S.C. § 6901 *et seq.*, preempted state law. The county had attempted to bring an action in federal court and been dismissed on appeal for lack of subject-matter jurisdiction. *Lawrence County v. State of South Dakota*, 668 F. 2d 27 (8th Cir. 1982). In a footnote, the Court said the Eighth Circuit's ruling was erroneous because the county had also sought an injunction under the Supremacy Clause. *See* 469 U.S. 259, n. 6, 105 S. Ct. 697 n. 6.

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[25] The Human Rights Law, NY Exec. Law §§ 290-301 (McKinney 1982 and Supp. 1982-1983) was held to be partially preempted by federal law; the Disability Benefits Law, NY Work Comp. Law §§ 200-242 (McKinney 1965 and Supp. 1982-1983) was not preempted.

[26] S.D.Codified Laws § 5-11-6 (1980).

The statements in these cases are undeniably troublesome because they imply that the approach adopted in *Michigan Sav. & Loan* may be erroneous. But they are even more confusing in light of *Wycoff* who just like this plaintiff was a regulated party seeking declaratory and injunctive relief to guard against the possibility of adverse state regulation. As stated in this Court's June 16 Memorandum, the question of ripeness and the policy of deference to state administrative agencies also supports dismissal.

Both *Wycoff* and *Michigan Sav. & Loan* are analogous factually and legally to the case before the Court. Neither case has been overruled. Later cases in our circuit, while not analytically as close as these cases, nonetheless rely extensively on a *Wycoff* analysis. The Supreme Court's language in later cases, although strongly put, is not controlling in the cases in which it appears. It is unclear how this language fits in with *Wycoff*, which is still approved by the Supreme Court. When neither of the cases that are unquestionably binding on this Court have been overruled or modified, this Court is loathe to ignore them absent further guidance.

Accordingly, the motion to reconsider is denied.

APPENDIX D

NOT FOR PUBLICATION

88-5974

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEDERAL EXPRESS CORPORATION,
Plaintiff - Appellant,

v.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Defendant - Appellee.

ON APPEAL FROM THE
MIDDLE DISTRICT OF
TENNESSEE.

BEFORE: KEITH and NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

PER CURIAM: Plaintiff Federal Express Corporation ("Federal Express") appeals from the judgment of the district court dismissing its case for lack of federal subject-matter jurisdiction and denying its request for relief from state regulations promulgated by defendant Tennessee Public Service Commission ("the Commission").

On June 9, 1987, the Commission made an administrative determination that Federal Express is a motor carrier engaged in intrastate transportation and is subject to state regulation under the Tennessee Motor Carriers Act, Tenn. Code Ann. § 65-15-101, *et seq*. The Commission rejected Federal Express' arguments that the Airline Deregulation Act of 1978, 49 U.S.C.§ 1350 (a), preempted any form of state regulation. After the Tennessee Court of Appeals denied Federal Express' motion for

a stay of the Commission's order demanding compliance with the Tennessee state regulations, Federal Express filed suit in federal district court for declaratory and injunctive relief on the grounds of federal preemption. Relying on *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952) and *Michigan Savings and Loan v. Francis*, 683 F.2d 957 (6th Cir. 1982), the district court identified the crucial issues of the case: whether the Tennessee Motor Carrier Act was applicable to Federal Express and whether federal preemption arose only as a defense to that initial issue. Declining to reach the merits of the dispute, the district court dismissed the case for lack of federal subject-matter jurisdiction. *See Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 693 F. Supp. 598 (M.D. Tenn. June 16, 1988) (denying Federal Express' request for relief from state regulations); *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, No. 3087-0633, mem. op. (M.D. Tenn. Aug. 17, 1988) (denying Federal Express' motion for reconsideration).

Upon review of the well-reasoned opinion of the Honorable Thomas A. Wiseman, Jr., Chief Judge of the United States District Court for the Middle District of Tennessee, we conclude that he properly analyzed the issues and reached a correct result. Accordingly, we AFFIRM based on the reasoning of the district court opinion.

Case No. 88-5974
Federal Express v. Tennessee Public Service

EDWARDS, Senior Circuit Judge.

Respectfully, I dissent. I agree with *both* parties in this matter that the District Court erred in holding that the federal court lacked subject matter jurisdiction. I dissented in this court's decision in *Michigan Savings and Loan v. Francis*, 683 F.2d 957 (6th Cir. 1982), and I believe I must do so again.

The United States Supreme Court in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, at 96 n. 14 (1983), albeit in a footnote, appears to me to have settled this matter:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex Parte Young*, 209 U.S. 123, 160-162, 52 L.Ed. 714, 28 S.Ct. 441 (1908). A plaintiff who seeks injunctive relief from state regulation on the ground that such regulation is preempted by a federal statute which by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

463 U.S. at 96, n. 14 (citations omitted).

This case comes to us on a motion for injunctive and declaratory relief. A claim for injunctive relief in a case such as this, where the potential for immediate and irreparable injury is present and where federal preemption and the Supremacy and Commerce Clauses of the U.S. Constitution lie at the heart of the matter, *cf. Public Service Commission v. Wycoff*, 344 U.S. 2327 (1952), is within the ambit of federal subject matter jurisdiction. *See Middle South Energy V. Arkansas Public Service Commission*. 772 F.2d 404 (8th Cir. 1985), *cert, denied, Ratepayers Fight Back v. Middle South Energy*, 474 U.S. 1102 (1986); *Braniff International, Inc. v. Florida Public Service Commission*, 576 F.2d 1100 (5th Cir. 1978).

If the federal courts lack subject matter jurisdiction to decide whether the Airline Deregulation Act prohibits states from regulating Federal Express, then fifty states will examine the same federal preemption claim and reach varying results, in direct conflict with the Interstate Commerce Clause and Congressional intent.

I would reverse the District Court's opinion and remand for a determination on the merits.

878 F.2d 381

DECISIONS WITHOUT PUBLISHED OPINIONS

UNITED STATES COURT OF APPEALS

Sixth Circuit

DECISIONS WITHOUT PUBLISHED OPINIONS

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
Adkins v. Seabold	88-6356, 88-6357, 88-6358, 88-6359	6/23/89	AFFIRMED	W.D.Ky.
Blandford v. Sowders	89-5127	6/23/89	AFFIRMED	W.D.Ky.
Bryan v. Northrop	88-1314	6/23/89	AFFIRMED IN PART AND REVERSED IN PART	W.D. Mich.
Castle v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor	88-3191	4/25/89	REMANDED	Ben.Rev.Bd.
Christian v. Larkin	88-5222	6/27/89	VACATED AND REMANDED	W.D.Ky.; Remand from 109 S.Ct. 2426
Cook v. Parke	88-6381	6/26/89	AFFIRMED	E.D.Ky.
Comett v. Comett Coal Co.	88-3744	5/18/89	AFFIRMED	Ben.Rev.Bd.
Conk v. Secretary of Health and Human Services	88-1887	7/3/89	AFFIRMED	E.D.Mich.
Culp v. U.S. Parole Com'n	88-6265	6/23/89	AFFIRMED	W.D.Tenn.; Appeal after remand 732 F.2d 153
Daniel v. Ohio Cas. Ins. Co.	88-5797	7/5/89	APPEAL DISMISSED; CASE REMANDED	E.D.Ky.
Darnell v. Tennessee Valley Authority	88-6413	6/23/89	VACATED AND REMANDED	E.D. Tenn.
Dixon v. Dutton	88-5483	7/5/89	APPEAL DISMISSED	M.D. Tenn.
Evans v. Director, Office of Workers' Compensation Programs, U.S. Dept of Labor	87-3977	4/4/89	REMANDED	Ben.Rev.Bd.
Federal Exp. Corp. v. Tennessee Public Service Com'n.	88-5974	7/3/89	AFFIRMED	M.D.Tenn., 693 F.Supp.598
Flippin v. Martin	88-6337	6/23/89	AFFIRMED	W.D.Ky.
Giannone v. Citizens Banking Co.	88-3768	7/3/89	AFFIRMED	N.D.Ohio
Graham v. Haberlin	88-6436	6/26/89	AFFIRMED	W.D.Ky.
Gwyddioniaid v. O'Neil	88-6346	6/26/89	AFFIRMED	E.D.Ky.
H & S Transp. Co., Inc., In re	88-6168	6/23/89	REVERSED	M.D.Tenn., 90 B.R. 309

APPENDIX E

No. 88-5974

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Federal Express Corporation
Plaintiff-Appellant,

v.

Tennessee Public Service
Commission, et al.,
Defendant-Appellee.

ORDER

BEFORE: KEITH and Norris, Circuit Judges; EDWARDS, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other judges of this court, and a majority of judges not having requested rehearing en banc, the petition for rehearing has been referred to the original panel.

Both parties, in addressing the petition for rehearing, noted their agreement that the panel's ruling was incorrect, on the jurisdictional issue raised by the appeal. It also appears to be inconsistent with the decision (recommended for full-text publication) of another panel of this court in *CSXT, Inc. v. Pitz*, Nos. 88-1629 & 88-1642 (6th Cir. Aug. 22, 1989).

Accordingly, the panel has concluded that its opinion should be amended by deleting the final paragraph and substituting this language:

> However, as this court recently pointed out in *CSXT, Inc. v. Pitz*, Nos. 88-1629 & 88-1642 (6th Cir. Aug. 22, 1989),

the district court did have jurisdiction. Accordingly, the judgment of the district court is reversed, and this cause is remanded for further proceedings according to law, including consideration of the question of abstention in view of this court's opinion in *CSXT, Inc. v. Pitz*.

Having so amended our original opinion, the petition for rehearing is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

MANDATE ISSUED: OCTOBER 24, 1989

COSTS TAXED: NONE Clerk

DECISIONS WITHOUT PUBLISHED OPINIONS —Continued

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
E.E.O.C. v. Patrick Henry Educ. Ass'n	90-3423, 90-3346	8/8/90	VACATED	N.D.Ohio, 741 F.Supp.670
Federal Exp. Corp. v. Tennessee Public Service Com'n	88-5974	10/6/89	REVERSED	M.D. Tenn., 693 F.Supp. 598; (amending 878 F.2d 381)
Fleetwood v. Bailey	89-2169	8/8/90	AFFIRMED	W.D.Mich.
Ford v. Tarter	89-6421	8/1/90	AFFIRMED	W.D.Ky.
Franklin v. Anderson	89-6312	8/8/90	AFFIRMED	M.D.Tenn.
Fugate v. U.S.	89-5884	8/8/90	AFFIRMED	W.D.Ky.
Gillenwater v. Parke	89-6239	8/8/90	VACATED	E.D.Ky.
Green v. Smith	89-6522	8/13/90	AFFIRMED	W.D.Ky.
Hardin v. Lahiri	89-2158	8/9/90	AFFIRMED	E.D.Mich.
Harris v. Jones	89-2250	8/2/90	AFFIRMED	E.D.Mich.
Hufstetler v. State of Tenn.	89-6309	8/2/90	AFFIRMED	M.D.Tenn.
Iles v. Logo Paris, Inc.	89-2136	8/14/90	AFFIRMED	E.D.Mich.
Johnson v. Brown	90-1274	8/14/90	AFFIRMED	E.D.Mich.
Johnson v. Daniels	89-2012	8/9/90	AFFIRMED IN PART, VACATED IN PART	E.D.Mich.
Johnson v. Graves	89-6117	8/1/90	AFFIRMED	E.D.Ky.
Johnson v. Ionia U.S.Postal Service, Regional Chief Postal Inspector	90-1078, 90-1313	8/10/90	AFFIRMED	W.D.Mich.
Johnson-El v. Onley	89-2294, 89-2295	8/8/90	AFFIRMED	W.D. Mich.
Jones v. Cosmic Travel	90-1023	8/10/90	RELIEF DENIED, ORDER VACATED	E.D.Mich.
Kane v. Rochlin	89-2280	8/3/90	AFFIRMED	E.D.Mich.
Kin Sun Yuen v. Story	89-6389	8/3/90	AFFIRMED	E.D.Ky.
Lee v. U.S.	89-6431	8/9/90	AFFIRMED	E.D.Tenn.
Lewis v. Blue Diamond Coal Co.	89-4028	8/10/90	AFFIRMED	Ben.Rev.Bd.; Appeal after remand 820 F.2d 405
Long v. Hancock	89-6233	8/8/90	AFFIRMED	W.D.Ky.
McDowell v. Liberty Cash Grocers, Inc.	90-5027	8/13/90	AFFIRMED	W.D.Tenn.; Appeal after remand 863 F.2d 1302
McKaye v. Toombs	89-2202	8/2/90	AFFIRMED	W.D.Mich.
Martin v. Hofbauer	89-2310	8/2/90	AFFIRMED	E.D. Mich.
Martin v. Jabe	89-2113	8/10/90	AFFIRMED	E.D.Mich.
Means v. Montgomery	89-6313	8/3/90	AFFIRMED	W.D.Ky.
Medina v. Lydick	90-1065	8/14/90	AFFIRMED	E.D.Mich.
Miller v. Gluch	89-1910	8/2/90	AFFIRMED	E.D.Mich.
Mitchell v. Davis	89-6214	8/2/90	AFFIRMED	E.D.Tenn.
Mitchell v. Jones	89-6240	8/2/90	AFFIRMED	E.D.Tenn.

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

OFFICE OF THE CLERK
800 United States Courthouse
Nashville, Tennessee 37203

(615)-736-7178

DATE: 8-10-87

RE: Federal Express Corp. v. Tennessee Public Service Commission, et al.

3:87-067-0633
Judge Nixon

Enclosed is a copy of the following:

ORDER

entered on the docket by the Clerk in compliance with Rule 58 and/or Rule 79(a) of the Federal Rules of Civil Procedure on 8-10-87.

CLERK, U.S. DISTRICT COURT

BY: /s/ Doris Bush
Deputy Clerk

Copies sent to:
Marian F. Harrison
Alfred H. Knight
Don Scholes
Robert L. Baker
Jean Nelson
Val Sanford

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FEDERAL EXPRESS CORPORATION

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al.

No. 3-87-0633

Judge Nixon

ORDER

This action came on to be heard on August 7, 1987, on the plaintiff's motion (filed August 7, 1987) for a temporary restraining order. Having considered the plaintiff's motion and the supporting papers, including the affidavit of A. Doyle Cloud, and the argument of counsel (including argument of counsel for intervenor, Purolator Courier), the Court finds that the motion should be granted.

This is an action for declaratory and injunctive relief. The Court has jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

The Court finds that there is a substantial risk that irreparable injury will occur if the plaintiff is required to submit to regulation by the defendant, Public Service Commission, by filing an immediate application for certificate of convenience and necessity, pursuant to the defendants' order of June 9, 1987, because submission to the jurisdiction of the Public Service Commission by filing an application may render moot the plaintiff's constitutional and federal statutory claims, and unduly interfere with the harm the plaintiff's alleged integrated transportation system developed under federal authorization.

After due consideration, the Court finds that the plaintiff has shown the requisite likelihood of success on the merits and irreparable or substantial injury. In like fashion, the court finds that the issuance of a temporary restraining order will not cause any substantial harm to the defendants and that the public's interest will be served by doing so.

Accordingly, the defendants, their agents and employees are restrained from enforcing the order of the Tennessee Public Service Commission issued June 9, 1987, or otherwise interfering with the plaintiff's intrastate service provided solely by motor vehicle. The plaintiff's motion for a preliminary injunction is set for hearing before The Honorable John T. Nixon, United States District Judge, at 9:00 a.m. on Thursday, August 20, 1987.

It is so ORDERED.

Thomas A. Higgins
United States District Judge
8-10-87 3 pm